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CASES ARGUED AND DETERMINED

IN THE

# Supreme Court of Colorado

AT THE

SEPTEMBER TERM 1912 AND
THE JANUARY AND APRIL TERMS 1913.

E. T. WELLS
REPORTER

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## JUSTICES OF THE SUPREME COURT

**DURING THE TIME OF THESE REPORTS.**

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MORTON S. BAILEY,
WILLIAM A. HILL,
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JAMES E. GARRIGUES,
TULLY SCOTT‡‡,
} JUSTICES.

BENJAMIN GRIFFITH*, ATTORNEY GENERAL.

FRED FARRAR‡, ATTORNEY GENERAL.

JAMES R. KILLIAN, CLERK.

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*Until January 14th, A. D. 1913.
‡After January 13th, A. D. 1913.
‡‡Elected Nov. 4th, A. D. 1912, *vice* Campbell, whose Term Expired.

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# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

# STATE OF COLORADO

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## SEPTEMBER TERM, 1912

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[No. 6735.]

### DENVER OMNIBUS & CAB CO. v. GAST.

1. JOINT TORT—*Charged Against Several—Recovery Against One*—On complaint charging a joint tort against several, and evidence convicting one or part of the defendants, plaintiff may have judgment against those shown to be guilty, the others being acquitted. Plaintiff is not required to elect and discontinue as to those against whom no case is made.

2. PLEADING—*Answer—General Denial*—The general denial casts upon the plaintiff the burden of establishing all the material allegations of the complaint, regardless of the other defenses in the answer.



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3. ——*Inconsistent Defenses*, may be presented in the same answer.

4. ——*Construction*—The reply may be referred to to determine plaintiff's then understanding of the averments of the answer.

5. —— ——Plaintiff sought to charge a carrier with the loss of a trunk. The answer admitted that at the day and place mentioned in the complaint some person unknown to defendant delivered to it a trunk, but "whether plaintiff was the owner of the trunk * * * defendant has not and cannot obtain sumcient information, etc." *Held*, the burden was upon the plaintiff to show that he was the owner of the trunk, and that an instruction to the effect that defendant admitted by its answer that he had received plaintiff's trunk, was error.

6. EVIDENCE—*Competency*—In the same case the evidence tended to show the delivery of the trunk by plaintiff to the porter of a certain hotel. *Held*, that defendant was at liberty to show that this porter had no authority to accept baggage for it.

Plaintiff by his deposition testified that the driver of defendant gave him its check, of a certain number, for his trunk. The check was not attached to the deposition. A letter of the defendant which was read in evidence stated that he received a hotel check from the porter of a certain hotel.

At the trial plaintiff's attorney offered what purported to be a check of defendant of the same number as that mentioned in plaintiff's deposition; but it was not identified, or its authenticity in any manner shown. *Held*, that an objection to its admission should have been sustained.

*Error to Denver District Court.*—Hon. GEORGE W. ALLEN, Judge.

Messrs. THOMAS, BRYANT, NYE & MALBURN, for plaintiff in error.

Mr. W. W. COVER, for defendant in error.

*Upon Petition for Rehearing.*

Mr. JUSTICE HILL delivered the opinion of the court:

This action was brought by Wilson M. Gast against The Denver Omnibus and Cab Company, The Union Depot and Railway Company, and The Chicago Burlington and Quincy Railway Company, to recover damages for the loss of his

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trunk and contents. The verdict of the jury and judgment were against The Denver Omnibus and Cab Company, but in favor of the other defendants. The cab company brings the case here for review on error. By stipulation Martha E. Gast, administratrix of the estate of Wilson M. Gast, deceased, has been substituted as defendant in error.

The complaint alleges that plaintiff delivered his trunk to the defendants as common carriers, to transport from 1673 Broadway, Denver Colorado, to Williamsport Pennsylvania. The testimony on behalf of plaintiff was to the effect that he delivered the trunk to the cab company, and that its engagement was to transport it from 1673 Broadway to the baggage room of The Union Depot and Railway Company in Denver, which it failed to do. There was no evidence connecting the other defendants with the transaction. The action was a joint one for tort against all three defendants, for which reason it is urged that proof of a separate tort by the cab company, and failure to prove any concert between the defendants resulting in the loss of the trunk, is fatal to the action; that in order to hold persons jointly liable for tort it must appear in some way that it was the result of their joint action, or joint neglect of duty. As we understand it, in an action charging this kind of a joint tort, the rule is that the plaintiff will be permitted to recover against such of the defendants as his testimony establishes by community of fault were guilty of the tort charged, and that a judgment can be entered accordingly.—*Carper v. Risdon,* 19 Colo. App. 530; *Dahms v. Sears,* 13 Oregon 47; sec. 241, Rev. Code 1908.

Some states hold, that in order to secure such a judgment, the plaintiff must, at the trial, amend his complaint and proceed against the parties whom the evidence shows are jointly liable for the tort; that in such case he is entitled to amend as a matter of course.—*Sturzebecker v. The Inland Co.,* 211 Pa. St. 156. But in a case where it is debatable whether the evidence sustains the action against some particular defendant, we think that the rule announced in *Carper v. Risdon, supra,*

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is the better one, and that instead of requiring the plaintiff to elect, and dismiss the action against certain of the defendants, it is just as competent for either the court or jury to find certain defendants liable, and others not, as the evidence to them discloses.

The complaint alleges an agreement on the part of defendants to convey the plaintiff's trunk to Williamsport, Pennsylvania. The evidence fails to establish this. If the cab company received the trunk (which is in dispute), the evidence tends to establish that its agreement was to convey it to the baggage room of the depot company; for which reason it is urged that the case should fail because the contract set up in the complaint was not established. As the case must be reversed for other reasons we deem it unnecessary to pass upon this question for the reason that the material allegations of the complaint are the receipt of the trunk, the agreement to transport it somewhere, or do something with it, the failure of the company to do so, and its loss. As the place where it was to be transported, if changed, would not state a new cause of action or jeopardize the rights of the defendant, the question can be eliminated by amending the pleadings prior to a new trial.

By instruction 2 the jury were told, in substance, that the cab company admitted in its answer that it received the plaintiff's trunk and that the burden was upon it to account for it, and on failure to do so it was liable for its value. In this the trial court erred. The first defense set up in the amended answer is a general denial. This is sufficient to place the burden on the plaintiff of proving all the material allegations of his complaint, regardless of the other defenses in the answer, even if they are incomplete.—*Pike v. Sutton,* 21 Colo. 84; *Bessemer I. D. Co. v. Woolley,* 32 Colo. 437, 444.

Under our rule of practice separate defenses may be inconsistent with each other.—*Pike v. Sutton, supra; Hill v. Groesbeck,* 29 Colo. 161; *Koll v. Bush,* 6 Colo. App. 294; *Western Union Tel. Co. v. Eyser,* 2 Colo. 141; *Duffield v.*

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*D. & R. G. R. R. Co.*, 5 Colo. App. 25; *Travelers Ins. Co. v. Redfield*, 6 Colo. App. 190; *People ex rel. v. Lothrop*, 3 Colo. 429; *Hummel v. Moore*, 25 Fed. 380; *Colo. Central C. M. Co. v. Turck*, 50 Fed. 888, 892.

This instruction eliminated the debatable question of the receipt of the plaintiff's trunk by the defendant. This was made an issue by the first defense in the amended answer. This is sought to be justified under the claim that the defendant, in its amended answer, admitted the receipt of his trunk at 1673 Broadway. We do not so understand the effect of this pleading, the substance of which is that the company admits that some one, to it unknown, did, on the 19th of July, 1906, deliver to it a certain trunk at 1673 Broadway, but as to whether plaintiff was the owner of the trunk, or whether the contents was of the value of $1,000, the defendant has not and cannot obtain sufficient information upon which to base a belief. The record discloses that the plaintiff at that time did not assume that the company admitted the receipt of his trunk, for the reason that in his replication to the amended answer he says, "Plaintiff admits that 'some one' did on the 19th day of July, 1006, deliver to defendant in the city and county of Denver a certain trunk, which trunk plaintiff avers was delivered by plaintiff to the defendant herein, and is and at the time was the said trunk of plaintiff in question." It will thus be observed that the issues as made up cast the burden upon the plaintiff to establish that the trunk admitted to have been received by the defendant at 1673 Broadway was the trunk of the plaintiff. The deposition of the plaintiff upon this question was, in substance, that he was the owner of a trunk and its contents which he delivered upon July 19th, 1906, at about 11 P. M. at 1673 Broadway to one of the drivers of The Denver Omnibus and Cab Company, for delivery to the union depot at Denver, for which he paid the driver fifty cents; that he received from the driver a check of The Denver Omnibus and Cab Company, No. 3295.

The deposition of Charles E. Lamm was that he was

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with Gast at the time. The remainder of his testimony was the same as Gast's.

William H. Wheadon testified that he was secretary of the Denver lodge of Elks; that as such he received a letter from the plaintiff dated Williamsport, Pennsylvania, September 6th, 1906. This letter was introduced in evidence, in which Mr. Gast, in substance said that in leaving Denver, after attending the Elks' convention, he had his trunk checked by porter of Savoy hotel, night of July 20th, having stopped across the street from Savoy at 1673 Broadway; that the porter of Savoy took the trunk over to hotel, giving him Savoy hotel check 3295 for same; that following morning baggage department claimed trunk had not reached depot, but gave him their check No. 65926 for the Savoy check; that he had not received the trunk yet, and in a letter from baggage agent Campbell August 11th, he was informed The Denver Omnibus and Cab Company had no record of receiving trunk from hotel; that hotel people were unable to locate it up to that time. He requested investigation by the secretary, also said, "It is possible that the porter stole this trunk, and probably the police department could learn who was porter at the Savoy hotel night of July 20th, and by seeing that individual could learn something of the present location of same."

A Mr. McIlduff testified that he lived at 1673 Broadway, knew Wilson M. Gast, met him at witness' home here; that Mr. Gast wrote him to go to night porter of Savoy hotel and try to trace the trunk from there.

Mrs. McIlduff testified that she resided at 1673 Broadway; that Mr. Gast came to their house to room during the Elks' convention; that when he got ready to leave he went to Savoy hotel and had the night porter come over and get his trunk; that he brought over a light hand cart and took the trunk to Savoy hotel between 9:30 and 11 o'clock; that Mr. Gast left the following morning; that there was no wagon of The Denver Omnibus and Cab Company at her house after the trunk; that Mr. Gast, Mr. Lamm, herself and another

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lady, who lives in Oregon, were present when the porter of the Savoy hotel came over and got the trunk; that the night porter never took any other trunks from her house that she knew of.

It will be observed that there was a sharp conflict in the evidence concerning the delivery of the plaintiff's trunk to the cab company. There was no evidence offered to establish that the porter of the Savoy hotel was a representative of the company, or had authority to check trunks for it; while there is an irreconcilable conflict between the plaintiff's deposition and his letters, concerning the disposition of his trunk. The defendant sought to show that the porter had no authority to accept trunks for it. The evidence was rejected, presumably upon the same theory under which the instruction was given, competent evidence upon this subject was proper. It will thus be observed that the issue concerning the receipt of the plaintiff's trunk by the defendant was never considered by the jury. This necessitates a reversal of the judgment.

In view of a new trial we call attention to the admission in evidence upon behalf of the plaintiff of defendant's purported check No. 3295. This was objected to as not being identified, and no foundation laid for its admission. When this objection was made counsel for plaintiff said, "It is the check Mr. Gast refers to in his deposition." It was not made a part of the deposition, nor produced or identified by any witness. It was presented by counsel for plaintiff. The identity of the checks became material for the reason that the plaintiff testifies that a driver of the defendant gave to him its check No. 3295 when he received his trunk, while his letter states that the porter of the Savoy hotel gave him a hotel chock of the same number. In the manner offered the objection to its admission should have been sustained.

Other assignments urged pertaining to instructions refused and given and the sufficiency of the evidence need not be considered. In view of the briefs and the knowledge dis-

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closed by the authorities cited; most, if not all, of these questions can be eliminated upon a second trial.

The former opinion is withdrawn; the judgment is reversed and the cause remanded for a new trial in harmony with the views herein expressed. Both parties will be permitted to amend their pleadings as they may be advised.

*Reversed and Remanded.*

Decision *en banc.*

Mr. JUSTICE GABBERT and Mr. JUSTICE GARRIGUES dissent.

CHIEF JUSTICE CAMPBELL not participating.

Decided November 6, A. D. 1911. On rehearing judgment reversed January 6, A. D. 1913.

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[No. 5932.]

## TUCKERMAN ET AL. V. CURRIER ET AL.

WRIT OF ERROR—*Where the Writ Lies—Final Judgment*—An order removing executors, acting as testamentary trustees, and appointing a receiver for the estate is a final judgment, and the executors may have a writ of error to review such order.

*Error to Weld District Court.*—Hon. LOUIS W. CUNNINGHAM, Judge.

Mr. JAMES W. MCCREERY, for plaintiffs in error.

Mr. CHARLES D. TODD, Mr. R. T. MCNEAL and Mr. CHARLES R. BROCK, for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This writ of error is between the same parties and involves one phase of the contention covered by case No. 6085, *James Tuckerman et al. v. Mary B. Currier et al.*, decided at

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this term. Its object was to secure a reversal of the order removing the plaintiffs in error from (as the order states) acting as trustee of the Currier estate and in the appointment of a receiver therefor. This order was made some time prior to the rendition of the final judgment in the case upon the many other questions involved. A supersedeas was granted. The only separate contention here made is that the order removing the plaintiffs in error and appointing a receiver is interlocutory and not final, and that a writ of error will not lie to review such order, for which alleged reasons a motion was made to quash the supersedeas and writ and dismiss the action. Upon hearing this motion was denied.

All other questions are covered in the other opinion. For the reasons there stated, the judgment of the trial court in the removal of the plaintiffs in error and in the appointment of the receiver, is reversed and the cause remanded.

*Reversed and Remanded.*

Decision *en banc*.

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES not participating.

Mr. JUSTICE WHITE dissents.

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[No. 6085.]

## TUCKERMAN ET AL. V. CURRIER ET AL.

1. WILLS—*Construction*—The intention of the testator is to be derived primarily from the language of the will itself; and it is to receive effect as written, if not opposed to some positive rule of law, or against public policy.

And it is to be presumed that the testator knew the law governing the subject matter of his directions.

2. ——*Power of Testator to Appoint Successors to Executor*—It seems that where the will directs that if the executor named dies, another shall be his successor, the one so designated is executor by

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substitution, and not a mere administrator *de bonis non*. No rule of law prevents a testator from providing a system for the selection of a successor to the executor named in his will. He may provide conditional, limited, or substituted executors, in case of vacancy, conferring upon them the same powers as conferred upon those first designated.

And the county court, upon a provision in the will to that effect, may appoint a successor to the executor, with all the powers which the will confers upon the original executor.

3. ——*Construed*—The testator, a man learned in the law, after certain specific bequests, devised all the rest of his estate "to my said executors * * * and to the survivor of them, and their successors, to hold, manage and dispose of, in trust for the uses and purposes following:" And after providing for the payment of an annuity to his widow, directed that the residue of the net income of his estate should by "said executors," be annually paid over in equal parts, to his two sons; directed that "said executors" should carefully collect and take care of said estate; authorized sales by them of any part of the estate; the re-investment by them of the proceeds of sales; directed that upon the death of both of his sons, "said executors, and the survivor of them, and their successors" should convey all the estate remaining, to the heirs at law of said sons; and finally declared his desire that "said board of executors shall be continued until the purposes of this will are fully accomplished, and the trusts herein created are fully executed; and that any vacancy in said board shall, on application of any beneficiary herein named, be filled by the appointment of the county court" of the county of his residence. *Held*, that the manifest purpose of the testator was to confer the estate devised, and the trusts and powers prescribed in the will, not upon any person as a personal trust, but upon the person holding the office of executor, and their successors, in perpetual succession, and to annex such estate and powers to the office of executors. That upon the acceptance of the resignation of the executors named in the will, and a valid appointment of successors, not only the powers, but the trust estate before that vested in the original executors, devolved by operation of law, upon the successors, without the formality of a conveyance.

The will enjoined upon the executors to "distribute fully the total net annual income and increment of my estate to the persons and in the time and manner herein provided, and so as to avoid the accumulation in their hands of property in excess of the total value of the assets that shall originally come to them under this will."

*Held*, that under this provision the estate must be dealt with *in solido;* that the increase in the value of one piece of property was

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not to be segregated, as income; that each parcel of property pertaining to the estate retains its character as part of the body of the estate, until every part of the estate has been subjected to examination and appraisement, and the whole aggregated.

4. EXECUTOR—*Removal—Effect Upon His Character as Testamentary Trustee*—Where one is named as executor, and by the same will as trustee, the revocation of his appointment as executor will not necessarily revoke his appointment as trustee; but where powers and duties not pertaining to the office of executor are conferred by the will upon the executor, he becomes, by virtue of his appointment, a trustee by operation of law; and if he resigns or is removed as executor, the duties and powers conferred upon him, in that character, terminate.

5. ——*Allowances*—Executors lawfully appointed and whose title, authority, and official conduct, is assailed by the beneficiaries under the will are justified in incurring any necessary legitimate expense in sustaining the validity of the will, and their appointments, and in defending, in good faith, their conduct while in office; and they are entitled to an allowance out of the estate for the amounts so necessarily and reasonably expended.

6. STATUTES—*Construed*—A statute (Mills Stat. § 4720) provided that when the letters of one of several administrators are revoked, etc., the county court may in its discretion "join others in their stead and place * * * and in case the letters of all of them shall be revoked, or all * * * shall depart this life before final settlement, etc., administration with the will annexed, or as the case may require, shall be granted to the person next entitled thereto." *Held*, that where the will so provided, executors might be appointed by the county court, as successors to those named in the will, and with all the estate and powers granted to, or conferred by the will upon, the original executors.

7. PLEADINGS—*Relief*, is to be confined to what, upon the facts stated, the party is entitled to.

*Appeal from Weld District Court.*—Hon. LOUIS W. CUNNINGHAM, Judge.

Mr. JAMES W. MCCREERY, for appellants.

Mr. CHARLES D. TODD, Mr. R. T. MCNEAL and Mr. CHARLES R. BROCK, for appellees.

Mr. JUSTICE HILL delivered the opinion of the court:

The pleadings as well as the evidence in this case are

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voluminous. In disposing of it, in addition to hearing oral arguments, we have read and considered over six thousand five hundred folios of record, in excess of five hundred pages of printed briefs, and have considered the questions involved in over five hundred and fifty cases cited, claimed to support the different contentions of counsel. Owing to the uncertainty of the title to such a large amount of property, and the importance of the other questions raised, we are not prepared to say that the greater part of counsels' efforts were not justified, but when the extent of such an amount of labor placed upon this court is realized, it is regrettable that many thoughtless people (including some members of the profession), who criticise appellate courts for their apparent delay in the number of such cases disposed of, are not familiar with these conditions.

We shall not attempt to set forth even the substance of all the issues but only such as are controlling of the principal contentions. The record discloses, without contradiction, that upon July 25, 1892, Judge Warren Currier died, leaving surviving his widow, (Lydia M.), two sons (George W. and Henry F.), their wives, and certain grandchildren (the sons and daughters of George W. and Henry F.). The deceased was possessed of a large estate, real and personal. He left a will which provides:

First, for the payment of debts.

Second, devises certain personal property to his wife.

Third, gives to his son George the use for life of the Greeley homestead, on certain conditions.

Fourth, gives to his son Henry the use for life (rent free) of certain real estate.

Fifth, provides for the adjustment of certain advancements made by the deceased to the above sons.

The sixth, seventh, eighth and a part of the tenth paragraphs, which are the cause of these contentions, read as follows:

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"6. I give, devise and bequeath all the rest and residue of my estate, real, personal or mixed, and wherever situated, to my said executors, to-wit, Bruce F. Johnson and Charles H. Wheeler, both of Greeley, and to the survivors of them and their successors, to hold, manage and dispose of in trust for the uses and purposes following, to-wit:

(a) Two thousand dollars on the net annual income therefrom to be collected by my said executors and paid over annually as an annuity to my said wife, in quarter yearly installments of $500 each during her natural life, the same to be accepted by her in lieu of dower and in full of all claims upon my estate not hereinbefore specified and provided for:—all such payments to be made upon her separate personal receipt and not otherwise.

(b) All the rest and residue of the total net annual profit and income that shall be derived from my said estate shall be collected by my said executors and by them annually paid over in equal parts to my two sons (they being my only surviving children) to-wit:—said George W. Currier and Henry F. Currier, during their natural lives, one-half thereof to each and upon the separate personal receipt of each. In case of the death of either the share of the other, (he still surviving) shall continue and be paid over to him during his natural life. But the share of the one deceased shall from the time of his death be distributed and paid over to his widow if then surviving, and to his then surviving children in equal parts to each, share and share alike; and such payments shall continue during the natural life of my son then surviving. The annual payments aforesaid shall be made in quarter yearly installments and upon the separate personal receipt of the party entitled to receive the same, and not otherwise.

(c) If either of my said sons shall die without leaving issue surviving him, the share of the annual income from my said estate of such deceased son shall go to and vest in and be paid over to his surviving brother in quarter yearly installments as aforesaid. If either of my said sons shall die leav-

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ing issue surviving him, such issue shall take the part and share of his or her father, and where there are several surviving children they shall share and share alike in said net annual income.

7. It is my will that my said executors shall carefully collect and take care of said estate and that they shall by proper sale or sales thereof convert such parts of it into cash as they shall judge to be for the best interest of my said wife and sons and other beneficiaries herein named or described, and to that end I give to said executors and to the survivors of them and to their successors, full power and authority to sell and convey said estate or any part thereof in fee simple, and to make all proper deeds and other conveyances thereof, reinvesting the proceeds of such sale or sales in such productive securities or improved productive real estate, as they may judge to be safe and remunerative, having primary reference to the safety thereof. I enjoin upon my said executors to distribute fully and carefully the total net annual income and increment of my estate to the persons and in the time and manner herein provided and so as to avoid the accumulation in their hands of property and assets in excess of the total value of the property and assets that shall originally come to them under this will.

8. Upon the death of both of my said sons, said George and Henry, said executors and the survivor of them and their successors are hereby empowered and directed to convey by proper deeds and other conveyances and in fee simple any and all estate, real, personal or mixed which shall then remain in their hands or subject to their control under the provisions thereof to the heirs-at-law of my said sons George and Henry respectively, the children of each taking one-half of said estate *per stirpes* in absolute ownership and in exclusion of all other persons; and I hereby give and bequeath to said children all the said estate so then remaining in the hands of my said executors, each family of children taking an inheritable estate therein in fee as the heirs-at-law of my said sons respectively,

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and taking the same *per stirpes* and not *per capita*, each family of children taking one-half thereof."

"10. It is my desire that said board of executors shall be continued until the purposes of this will are fully accomplished, and the trusts herein created are fully executed; and it is my will that any vacancy arising in said board shall on the application of any beneficiary herein named be filled by the appointment of the county court of said Weld county, Colorado, meaning the court in said county which shall have at the time jurisdiction of probate matters in Weld county."

The closing, unnumbered paragraph in the will reads,

"I hereby appoint Bruce F. Johnson and Charles H. Wheeler of said Greeley in said county of Weld to be the executors of this my last will and testament."

The will was probated September the 6th, 1892, in the county court of Weld county, and the executors named in the will, Bruce F. Johnson and Charles H. Wheeler, were given letters testamentary thereon. They qualified September 14th, same year, and acted as the executors from that date until May 23, 1893, when Charles H. Wheeler tendered his resignation, which was accepted by the county court and an order made appointing Horace G. Clark as his successor. Johnson and Clark continued to act until January, 1897, when they tendered their resignations to the county court, which, on January 30th, 1897, made an order accepting the resignations and appointing the plaintiffs in error, James Tuckerman and William Mayher as their successors. These last named appointees have continued to act as such executors and by virtue of such official capacity, have also performed the duties of trustees as provided for by the will, from the date of their appointment until the present time.

This action was instituted by the grandchildren of Warren Currier, the residuary legatees of the principal estate, against all former executors, Johnson, Wheeler, Clark, Tuckerman, Mayher, the two sons of the deceased (George W. and Henry F.), their wives and the widow (Lydia M. Currier).

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The complaint charges numerous acts of maladministration and breach of trust against all of the five persons who had acted as executors and performed the duties of trustees. It charges fraud, mismanagement and misconduct, whereby it is alleged that the principal estate sustained great losses, and was then being depleted by the fraudulent and illegal acts of its alleged trustees, in some of which the life beneficiaries George and Henry Currier are alleged to be parties. It denied the right and jurisdiction of the county court to appoint subsequent executors to fill vacancies caused by the resignation of Johnson or Wheeler, or its jurisdiction to recognize the rights of such person to perform the duties of trustees, or to in any particular supervise the administration of the trust created by the will. It alleges that the title to the property was still in Johnson and Wheeler as trustees. It prays for a construction of the will to include a declaration, that the county court was without jurisdiction to appoint successor executors and that the tenth paragraph attempting to confer such power be declared void. It also prays for the removal of Tuckerman and Mayher; the appointment of proper trustees; for a conveyance by Johnson and Wheeler of the trust property to such newly appointed trustees and for the appointment of a receiver, etc.

George W. and Henry F. Currier (fathers of the plaintiffs) filed answers to the bill admitting all allegations against the executors, and part of those against themselves. These answers embrace cross-complaints in which they attempt to set up independent causes of action against the executors; they make further charges of unfaithfulness on the part of the then executors and their predecessors. They allege the conversion and misapplication of large sums of money, both principal and income, and ask for the discharge of the executors, for an accounting, the appointment of a receiver, for new trustees, and for money judgments in their favor for large amounts.

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Demurrers filed by Johnson, Wheeler, Clark, Tuckerman and Mayher, which challenged the jurisdiction of the district court, were sustained. This ruling was reversed by our former court of appeals and the cause remanded with leave to all parties to amend. (*Currier v. Johnson,* 19 Colo. App. 94.) For other cases involving some phase of these contentions between some of the parties see *Currier v. Johnson,* 19 Colo. App. 245; *Currier et al. v. Clark,* 19 Colo. App. 250; *Currier v. Clark,* 19 Colo. App. 257; *Currier v. Johnson,* 19 Colo. App. 453; *Currier v. Johnson,* 31 Colo. 126.

Thereafter, the present and all past executors filed answers, denying all acts of maladministration, breach of trust, fraud, mismanagement and misconduct, and denied that the principal estate had sustained great or any loss, or that it was then, or had been depleted by the fraudulent acts of its trustees, etc., or at all. Trial was to court. The findings in substance, exonerate all the executors from any intentional wrong or fraud, or for any act of maladministration, breach of trust, mismanagement or misconduct for which they were to be held accountable in this action, except as hereinafter designated. The action was dismissed against Johnson, Wheeler and Clark, except that it was decreed that they execute quit claim deeds to the new trustees to be appointed for the original property, or any thereafter acquired by them as such officials. The material findings against Tuckerman and Mayher, in substance, are, that the county court assumed to appoint them as the successors to Johnson and Clark, who relinquished control of the estate to them; that they have ever since held possession and have assumed to administer the trust created by the will; that the county court did not appoint or assume to appoint them as administrators with the will annexed; that neither Wheeler nor Johnson, on relinquishing possession, conveyed or released the title of the property to those to whom they surrendered it; that Mayher and Tuckerman while still in charge have assumed to purchase with trust funds certain real estate (naming it); that by order of the county court they

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paid from the income of said trust funds certain fees and costs to Wheeler, Johnson and Clark on account of fees and costs paid by them to counsel for defending this suit after the reversal of said case by the court of appeals, a portion of which was never paid back; that they paid counsel fees and costs in defending a suit in the county court against them, brought to compel them to keep separate accounts of principal and income funds; that since the decision of the court of appeals they have continued to file reports in the county court, and paid court costs in connection therewith from the income of the life beneficiaries, including large amounts for filing and recording their reports, and for having them examined and passed upon; that they have retained from the income certain amounts for their salaries as executors, also have paid large amounts for counsel fees and costs in defending this litigation; that the property belonging to said trust estate is now, by reason of improved financial conditions, and the prosperity prevailing in the city of Greeley and vicinity, materially increased in value, and is now of a value in excess of its actual and inventoried value at the death of Warren Currier, in the sum of at least $10,000.

The conclusions of law necessary to consider are, that by said will the legal title to said estate was vested in defendants Wheeler and Johnson in trust for the beneficiaries named therein; that such legal title did not thereafter wholly or partially or at all devolve upon or become vested in Clark, Mayher or Tuckerman; that in accepting the resignations of Wheeler and Johnson, and in assuming to appoint Clark, Mayher and Tuckerman as successors, the county court of Weld county was without jurisdiction, right or authority to do so; that in so far as the tenth paragraph of the will attempts to confer upon said court power or jurisdiction to appoint trustees to administer said trust the same is void and inoperative; that neither of defendants, Mayher nor Tuckerman, has any lawful title to, or right or interest in, the property belonging to said estate. The decree removes them be-

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cause not legally appointed, and for other reasons as it is alleged. In addition to their removal personal judgments were entered against the defendants Tuckerman and Mayher in favor of George W. and Henry F. Currier (the life beneficiaries) in the sum of $10,626 for certain moneys paid out by them as aforesaid. The decree further provides that the trustees of said estate distribute to the life beneficiaries, George W. and Henry F., the increment or increase as found to exist in the sum of $10,000, under certain arrangements not necessary to consider. The defendants Tuckerman and Mayher bring the case here on appeal.

In the execution of wills the cardinal rule is to have due regard to the directions of the will and the true intent and meaning of the testator to be derived, primarily from the language of the will itself, and if the same is not contrary to some positive rule of law or against public policy, to give it effect just as written.—*In Re Shells' Estate,* 28 Colo. 167; *Platt v. Brannan,* 34 Colo. 125; *In Re Shapter's Estate,* 35 Colo. 578, 587; *Bacon v. Nichols,* 47 Colo. 31; *Murphy v. Carlin,* 113 Mo. 112; *Gordon v. McDougall,* 84 Miss. 715; Redfield on Wills, p. 385; *Nangle v. Mullanny et al.,* 113 Ill. App. 457; *Kenney v. Kennedy et al.,* 105 Ill. 350.

With this object in view we will proceed to consider the questions presented in their historical order. The first relates to the capacity in which Johnson and Wheeler were appointed. The appellants contend, that the testator intended to and did appoint them as executors, only, of his will, but by attaching to the office of executor certain trust duties, it made them, by operation of law, *ex-officio,* his trustees during the period they held the office of executor; that the title was vested in the persons from time to time who held the office, and not in the persons first named as executors. The appellees contend that a proper construction of the entire will discloses that he not only appointed them as executors, but, by the language used, he, also designated them personally as the

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trustees of the trust thus created and that the title went to them personally as such trustees and is still in them.

In construing a will it must be presumed that the testator knew the law.—*Nangle v. Mullanny et al.*, 113 Ill. App. 457.

This presumption is unnecessary in the case at bar. The testator was conceded to have been learned in the law, admitted to have once been a justice of the supreme court of Missouri, and, unless the language in the will indicates to the contrary, we must presume, that he used the word "executor" advisedly; that had he intended to appoint Johnson and Wheeler personally as trustees, and to devise his property to them *in personam* in trust, he would have used language sufficient to convey that intention. We fail to find such an expression in the will, but to the contrary running throughout the entire instrument we find the expressions "my said executors * * * and to the survivor of them and their successors" with a method provided in the will for the appointment of successors. The word "executor" is used in nearly every paragraph; the word "trustee" not at all. In paragraph 6 the device is made to executors, the survivors of them and their successors. In paragraph 7 the power is given alike to the executors and successors. In paragraph 8 the duty of final distribution is laid alike upon the executors and their successors. Paragraph 10 provides for the continuance of the board of executors, and the filling of vacancies by appointment made by the county court. In paragraphs 6, 7, 8 and 10 the final duty of distribution, as well as the continuance of the office until all purposes of the will are accomplished, are given and bestowed, not upon any definite person as a personal trust, but upon the persons in office in perpetual succession. The testator knew and assumed (as we all must) that executors die, resign, or become disqualified, and he could not have, by any use of words or language, more firmly annexed a declaration of his intentions to provide that the office (the functions and powers given) was not to, in this manner, be endangered

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until the objects provided for by the will had been accomplished. Taking these facts into consideration, the language is convincing that he intended to annex the estate and power devised and donated to the office of executor *virtute officii*. The will named Johnson and Wheeler as executors; it did not name them as trustees. They therefore became trustees by virtue of the fact that certain powers and duties were conferred upon them as executors which do not pertain to the powers and duties of executors, but belong to those of trustees. If a person be expressly named as executor, and also as trustee, the revocation of his appointment as executor will not necessarily revoke his appointment as trustee; but where powers and duties are conferred on a person appointed as executor, which do not pertain to the powers and duties of an executor but pertain to those of a trustee, the executor by virtue of his appointment becomes a trustee by operation of law, in which event the revocation of his appointment as executor, or his resignation as such, revokes his power to act as trustee and the duties and powers thus conferred upon him as an incident to his appointment as executor, terminate.—*Nangle v. Mullanny et al.*, 113 Ill. App. 457; *Mullanny v. Nangle et al.*, 212 Ill. 247; *Johnson v. Lawrence et al.*, 95 N. Y. 154; *McAlpine et al. v. Potter et al.*, 126 N. Y. 285; *McArthur v. Scott*, 113 U. S. 340; *Potter v. Couch*, 141 U. S. 296; *Scott v. West*, 63 Wis. 529; Vol. 7, Am. & Eng. Ency. of Law (1st Ed.), p. 238; *Colt v. Colt*, 111 U. S. 566; *Mather v. Mather et al.*, 103 Ill. 607; *Estate of Matthew Delaney*, 49 Calif. 76; *Carson v. Carson*, 88 Mass. 397; *Groton v. Ruggles et al.*, 17 Me. 137; Vol. 1, Perry on Trusts (5th Ed.), p. 36; *Mott v. Ackerman*, 92 N. Y. App. 539; *In Re Sturgis*, 58 N. E. (N. Y. App.) 646; *Royce et al. v. Adams*, 123 N. Y. App. 402.

For the reasons stated (which are fully supported by the authorities last cited) we conclude from the language used, that Johnson and Wheeler, by virtue of their appointments as executors and the powers given them by the will, became trustees by operation of law; that their resignation, its acceptance,

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and the appointment of their successors (if valid) revoked and terminated their powers to act as trustees, and that the title to the trust property devolves, by operation of law, upon their successors without the formality of a conveyance or assignment.

It is conceded that executors nominated by the will and their successors legally appointed may, as such executors, hold and administer testamentary trusts, if the will so provides *ex-officio* or *virtute officii.—Killgore v. Cranmer,* 48 Colo. 226; *Johnson v. Lawrence,* 95 N. Y. 154; *Laytin v. Davidson,* 95 N. Y. 263; *In Re McAlpine,* 126 N. Y. 285; *Kidwell v. Brummagim,* 32 Calif. 436; 39 Cyc. 249.

The fallacy of the appellees' arguments lie in the assumption that by the will Johnson and Wheeler were personally designated as the trustees of the trust created, when, as we have shown, it named them as executors only, and did not expressly or by necessary implication designate them as the trustees; they became *ex-officio* trustees only by virtue of the fact that certain powers and duties were conferred upon their office of executors which did not pertain to the regular duties of executors, but belonged to those of trustees. This is self-evident when we consider the language in the will which places these duties upon his executors, the survivor of them, and their successors, and devises his property to his executors, the survivor of them and to their successors, and provides for the method for the appointment of such successors. We know of no rule of law which prevents a testator from providing a system for the selection of a successor executor. As we understand the rule, he may provide conditional, limited or substituted executors in case of vacancy, giving to them the same powers as those designated in his will.—11 Am. & Eng. Ency. of Law (2nd Ed.), 747-748; *Bishop v. Bishop,* 56 Conn. 208; *Ingle v. Jones,* 9 Wall. 486, 497.

We are not unmindful of the argument and have considered the cases, which hold, where the same parties are appointed executors and trustees, and after many years have

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elapsed since the performance of the last duties as executors, and that the duties thereafter performed have been only those of trustees in such capacity, the law will assume that they have ceased to act as executors, and are acting as trustees only; but in the case at bar from the language used, the testator intended that the executors named, their survivors or successors should be continued and act as executors until the purposes of the will were fully executed. This intention is not declared in a single clause or sentence of the will, but runs through all its frame work and is interwoven into almost every provision thereof. We know of no rule of law which compels executors to close up an estate and turn it over to themselves as trustees within a certain time, where the will discloses a different intention. The opinions of this court throughout are that it is expected that the executors will continue to hold and act as such until the duties imposed upon them by the will have been fully executed.—*Hake v. Stott's Executors,* 5 Colo. 140; *Killgore v. Cramner,* 48 Colo. 226; *Wyman v. Felker,* 18 Colo. 382; *French v. Woodruff,* 25 Colo. 339, 346.

Suppose the will provided that the executors should, within a year from the date of its probate, sell the real estate and divide the proceeds among the heirs; in such case no one woud contend that such a duty was not properly imposed upon the executors, and that they should do this before they were discharged as such. In many of the cases cited the principal reason for holding the persons named as executors and trustees, in the capacity of trustees only, is that the wills clearly contemplate a period of time when there shall be a separation of functions and duties, when the duties of the executors as such shall end, and when, by reason of the trust invested in them by force of the will, they shall assume exclusively the character of trustees; but this will discloses a contrary intention; it provides that the board of executors shall continue until the purposes of the will are fully accomplished, and that any vacancy arising, on the application of any beneficiary is

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to be filled by the county court of Weld county. The testator emphasizes this intention by saying "meaning the court in said county which shall have at the time jurisdiction of probate matters in said Weld county." The contention of the appellees that the estate is unnecessarily burdened with the cost of executors' reports, etc., is answered in the declaration of the testator himself, a man learned in the law. When making these provisions he must have known that his estate would be burdened with the necessary court costs incidental thereto throughout the period prescribed by him for keeping it intact. Having thus provided the system which he thought necessary for the protection of his heirs—if it does not violate any positive rule of law—neither the beneficiaries nor the courts have any power to change the conditions prescribed.

The next contention urged is, assuming that the construction we have given the will is correct and that the testator intended as we have indicated, it cannot be carried into effect for the reason that the tenth paragraph which empowers the county court of Weld county to appoint a successor executor in case of a vacancy is void, for the reason that the county court sitting as a court of probate is without jurisdiction to make such appointment of either an executor or trustee; that only district courts which have unlimited chancery jurisdiction can appoint such trustees; that the county court sitting as a court of probate is limited to the appointment of an administrator with the will annexed.

Section 23 of article VI of the constitution says that the county courts shall be courts of record and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, etc., and such other civil and criminal jurisdiction as may be conferred by law, etc. Eliminating appellants' contention that the order of the county court is broad enough to cover their appointments as administrators with the will annexed authorized by section 4682, Mills', and that section 4749, Mills', gave to them as such the authority to do everything which they have done; if the legislature has

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clothed the county court with the power to appoint successor executors, it cannot be consistently argued that this section of the constitution has not vested them with this power. General section 4720, Vol. 2, Mills' Ann. Stats., in force at the time of the execution of this will, and at the time of these appointments, provides that where letters of one of several executors or administrators are revoked, or one or more of the executors or administrators shall die or become disqualified, the county court may, in its discretion, join others in their stead or place, and require additional bonds from such new administrator or administrators, or the survivor or survivors of such as shall not have their powers revoked, shall proceed to manage the estate, and in case the letters of all of them shall be revoked or all of said executors or administrators shall depart this life before final settlement and distribution of the estate shall have been made, administration with the will annexed, or *as the case may require shall be granted to the person next entitled thereto;* that in all cases where such executor or administrator shall have his letters revoked as aforesaid he shall nevertheless be liable on his bond to such subsequent administrator or administrators, or to any other person or persons aggrieved for any mismanagement, etc.

Unless all rules of construction are disregarded, by the language of this section, it was intended to vest county courts with power in certain cases to appoint subsequent executors. It says, "where one or more of the executors shall die or become disqualified, or in case the letters of all shall be revoked, the county court may, in its discretion, join others or * * * administration with the will annexed, or as the case may require shall be granted to the person next entitled thereto." If, as contended by counsel the only appointment that could be made under this section was that of administration with the will annexed, what meaning is to be given the word "executors" and what use is to be made of the words "join others in their stead or place?" The words "to join others in their stead or place" when applied to executors certainly mean an-

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other executor in the place of the other. On down in the section we find the words "or as the case may require shall be granted to the person next entitled thereto" when applied to executors as in this case, that person would be the person selected in the manner provided by the testator in the will; otherwise, all these words and phrases in the section must be treated as surplusage. This is contrary to all rules of construction when full force and effect can be given them and thereby harmonize the entire section. This can be done by holding that the county court may appoint successor executors in a proper case, thereby giving force and effect to all the language used in its ordinary sense.

In *Hake v. Stott's Executors,* 5 Colo. 140, this construction was assumed as a matter of course. The will appointed a certain person executor. The action was brought for his removal. The court held he should have been removed and that the county court was possessed with that power. After so deciding, among other things, the court said,

"It will be the duty of the county court, upon the removal of the executor, to appoint a successor under the provisions of the law; to take good and sufficient bond for the faithful discharge of his duty; to see that he discharges his duty, and generally to protect this fund from the rapacity of all comers."

We also have a legislative construction of this section. In 1903 it was thought proper to make a complete revision of our probate laws by their repeal and re-enactment; many changes were made in order to clear up questions then in doubt. The words "guardian," "conservator," "executor" and "administrator" were repeatedly inserted in the new act in order to make the meaning of certain sections more clear and certain. It is common knowledge that the burden of this revision was assumed by an organization of county judges effected in 1902. Upon account of their experience and knowledge of the defects existing, these gentlemen were eminently fitted to supervise such work. When we come to the revision

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of this section, which is general section 7121, R. S., 1908, we find the words "subsequent executor" are added in the last part of the section. This was unquestionably for the purpose of making clear the right of subsequent executors to bring suits against their predecessors for any defalcation, etc., the same as the former act said that administrators might do. The legislature must have assumed that the first portions of the old section authorized the county court to appoint subsequent executors, for the reason that they made no change in that portion, but realizing that there was a doubt as to the authority of a subsequent executor to bring a suit against his predecessors, they sought to make that more clear by inserting the words "subsequent executor," thus making the act read the same throughout as to administrators and executors. We conclude that the county court was possessed with the power, under the circumstances disclosed to appoint subsequent executors, and the appointments of the plaintiffs in error being substantially in compliance with the provisions of the will that they are not subject to attack. Illinois has vested her county courts with the same power.—*Kennedy v. Kennedy,* 105 Ill. 350; *Kinney v. Keplinger,* 172 Ill. 449.

It appears to be conceded where a direction in a will is that if the named executor dies another person shall be the successor; that the successor thus appointed is an executor by substitution and not a mere administrator *de bonis non.*—*Blake, Adm., v. Dexter et al.,* 66 Mass. 559; *Kinney v. Keplinger,* 172 Ill. 449.

In removing the present executors the decree says, in substance, because of their unauthorized appointment by the county court, and their misconduct as acting trustees of said estate, and the friction and feeling existing between them and the life beneficiaries. The acts pertaining to their alleged misconduct are not stated, nor any acts of hostility to the life beneficiaries. The record as a whole discloses that the real contest centers around the county court's jurisdiction to make the appointments, which included the validity of paragraph

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ten of the will, and not the other matters. The court in substance exonerates the executors from any fraud pertaining to any alleged breach of trust and in the oral opinion rendered says, in substance, that he was satisfied that no appointment he could make would long be satisfactory to the life beneficiaries, also that none of the executors had diverted any of the trust funds, but that they were not trustees *de jure,* and that he would do the same as though it was a matter of first instance, as if no trustees were in existence. From this record, had it not been for the erroneous conclusions of law pertaining to the jurisdiction of the county court, we cannot say that the decree would have been as it is pertaining to the removal of the executors, regardless of the alleged hostility existing between them and the life beneficiaries, whom it appears desire their removal.

It is quite probable that had the life beneficiaries requested the resignation of the executors, and not coupled with it a demand for the return of a large sum of money, most of which at least was properly paid out by them, that they—as their predecessors had done—would have resigned and turned the management over to others; but when the validity of certain portions of the will, including that upon which their appointments were based, is attacked, and when it is sought to hold them personally liable for the moneys expended in the defense of these matters, in the prosecution and defense of other suits, and in payment of their salaries, it is hardly probable that the mind of any individual is so constructed that he would be willing, under such circumstances, to voluntarily relinquish his claim to such appointment, confess the error of his actions (conceded by the court to have been in good faith), and also pay to the life beneficiaries a large amount of money equal to that expended by him in these matters, including that received as his salary for the time spent during a series of years in the performance of such duties. In any event from the conclusions reached, it follows that the county court has exclusive jurisdiction in the appointment of succes-

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sor executors when so provided for by the will.—General section 7121, R. S., 1908; *Hake, Guardian, v. Stotts' Executors,* 5 Colo. 140; *Kennedy v. Kennedy,* 105 Ill. 350.

It is alleged in the pleadings that some of the counsel fees were excessive. It is also alleged that other moneys paid to former executors were not justifiable, and that other fees paid in the defense of certain litigation against them were not justified or expended in good faith, for which reasons, the judgment of the trial court should be sustained concerning these matters. There is practically no evidence pertaining to the amount or value of these services, or any attempt to separate their acts as executors or as trustees. The only evidence we call to mind concerning extortion of fees is that of the appellant Mayher upon cross-examination, wherein he states, in substance, that it appears to him that some of the counsel fees were too high. The record as a whole discloses that the portion of the decree calling for the removal of the appellants and the personal judgment against them is based principally upon the erroneous assumption that the county court was without jurisdiction to appoint successor executors, for which reasons we do not feel justified at this time in attempting to separate and pass upon the matters proper to be determined in an action of this kind, as the issues and evidence now stand, but prefer to leave them to a trial court when they are properly separated and presented in harmony with the views herein expressed, that the appellants are the duly and lawfully appointed subsequent executors of the will. This justifies them in incurring any necessary and legitimate expenses in attempting to have sustained the validity of the entire will, their appointments thereunder, as well as to in good faith defend their course of procedure when attacked while in office. They have a right to an allowance out of the estate funds in a reasonable amount necessarily expended in such matters.—2 Perry on Trusts (3rd Ed.), sec. 910; *Kennedy v. Kennedy,* 105 Ill. 350; *Sherman et al. v. Loman,* 137 Ill. 94; 28 Am. & Eng. Ency. of Law (2nd Ed.), 1091.

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The decree provides that the trustees distribute to the life beneficiaries, George W. and Henry F. Currier, under certain conditions $10,000 out of the estate funds, as the increment or increase, pursuant to the provisions of paragraph 7 of the will. Considerable argument is presented and many authorities cited as to the correct meaning of these words as here used. It is claimed by the appellants that no such issue was raised by the pleadings or tried; that under our rules of practice the relief must be confined to that called for by the facts stated in the pleadings. The following cases sustain this general rule.—*Soden v. Murphy,* 42 Colo. 352; *Mott v. Scott,* 35 Colo. 68; *The Rubie C. G. M. Co. v. P. A. G. M. Co.,* 31 Colo. 158; *Greer v. Heiser,* 16 Colo. 306; *City of Pueblo v. Griffin,* 10 Colo. 366; *Miller v. Hallock,* 9 Colo. 551; *Tucker v. Parks,* 7 Colo. 62.

The allegations of the complaint as well as those in the cross-bill of the life beneficiaries were that the principal estate had been fraudulently reduced under the management of the several executors in about $25,000; for this reason the accounting was sought to be followed by a judgment against the executors requiring them to return to the principal estate this amount. The executors denied these allegations. To justify this judgment the court had to find not only that the allegations of the complaint and cross-complaint in this respect were not true, but that the allegations of the answer were more than true. If the findings upon which this portion of the judgment is based are to be considered at issue, we have the anomalous position of having the defendants attempting to prove a case in favor of the plaintiffs and cross-complainants, which they themselves are attempting to disprove. The appellants contend if it were a proper issue that the estate must be dealt with *in solido,* that the increase or supposed increase in one piece of property cannot be segregated as income, but still remains as a part of the principal estate until at least every part of the estate has been subject to an examination and appraisement and the whole aggregated. This

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appears to be the general rule.—*Outcalt v. Appleby,* 36 N. J. Eq. 73; *Parker v. Johnson,* 37 N. J. Eq. 366; *Parker v. Seeley,* 38 Atl. (N. J.) 280; *Parsons v. Winslow,* 16 Mass, 361; *New England Trust Co. v. Eaton,* 4 N. E. (Mass.) 69; *Van Barcom v. Dager,* 31 N. J. Eq. 783.

In addition to there being no such an issue made by the pleadings, the record discloses that the rule above stated was not followed. There was no evidence offered covering, or full or complete appraisement taken of all the property for the purpose of determining this question, or to show where certain items of property had increased in value (as found by the court in Greeley and vicinity) that this rise would offset the loss in certain other items which may have decreased in value. Manifestly, this could not be done upon the evidence concerning certain portions of the property only which had increased in value, when nothing is said about the remainder.

The facts and rule of law last stated are not seriously controverted, but are sought to be avoided by the contention that the appellants have no right to be heard upon the judgment pertaining to the increase and increment, the manner in which it was secured, or the evidence upon which it is based, under the well known rule that they have no personal interest in the result of this portion of the judgment which concerns the life beneficiaries and the residuary legatees only, all of which were parties to the action. The following cases are cited to sustain this contention.—*Benton v. Hopkins,* 31 Colo. 518; *Barth v. Richter,* 12 Colo. App. 365; *Black v. Kirgan,* 28 Am. Dec. 394; *Briard v. Goodale,* 86 Me. 100; *Estate of Marrey,* 3 Pac. (Calif.) 896.

Had such an issue been made by the pleadings we might find it necessary to pass upon the question, but the primary object of this case was to secure a construction of the will, the removal of the executors and personal judgments against them. Appellants charged with malfeasance in office; they had the right to be heard on these charges as well as upon the construction of the will, and the right to appeal from any rul-

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ing thereon. They brought with it the entire case wherein they would in any manner be effected personally, or in their official capacity; the matter of the increment or increase is not here alone. It was not made an issue by the pleadings in the court below. No motion was made to dismiss the appeal concerning this portion of the judgment. The record shows that some of the plaintiffs who are residuary legatees were minors represented by a guardian *ad litem* probably selected at the solicitation of the life beneficiaries; we say this, from the fact that the trial court, in substance, found that the original suit was instituted and thereafter maintained by them; upon this subject the court in its preliminary findings says:

"I have no difficulty in determining that this action has been waged by one, if not both, of the life-beneficiaries, and mostly instigated and inspired rather by them than by the children—the remaindermen. This is apparent all through the record.

It is significant that the remaindermen ask nothing of the beneficiaries, attended with the additional circumstance of the cross-bill being filed on the very same day, and, if I am a literary critic at all, drawn by the very same hand. It now appears of record that Henry is bearing most of the expenses of the litigation which abundantly supports the conclusion that it is being waged for his benefit."

We are of opinion that the evidence justifies this statement and when all these facts are taken into consideration with the fact that the cause must be reversed for other reasons, we do not think that such a case is presented which requires us to at this late date segregate this portion of the judgment from the other in order to establish a precedent either way as to the right of executors to take an appeal from such judgments, but prefer to remand the cause for a new trial when, if desirable, such an issue can be properly made up and evidence received and considered concerning it.

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The judgment is reversed and the cause remanded with leave to the parties to amend their pleadings as they may be advised. *Reversed and Remanded.*

Decision *en banc.*

Mr. JUSTICE MUSSER and Mr. JUSTICE GARRIGUES not participating.

Upon petition for extension of opinion by some of the appellees and for rehearing by others.

It is urged upon behalf of some of the appellees as this suit was instituted in part to procure a construction of the will that in considering the portion of the judgment which pertains to the increase or increment awarded to the life beneficiaries, we should place a construction upon the language in the will which reads:

"I enjoin upon my said executors to distribute fully and carefully the total net annual income and increment of my estate to the persons and in the time and manner herein provided and so as to avoid the accumulation in their hands of property and assets in excess of the total value of the property and assets that shall originally come to them under this will."

In view of a new trial or continued litigation upon this subject we have thought it proper to do so. A reading of the original opinion will disclose that in passing upon the question of increment, we accepted without discussion the meaning given to the word by the testator in the above paragraph. When this paragraph is considered in connection with the other portions of the will, which empowers the executors in their discretion to sell and dispose of all or any part of the property, both real and personal, and to re-invest the proceeds in productive securities or improved productive real estate as they may deem safe, there ought not to be any contention over it. Unless the force of this language is to be eliminated.

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it follows that the life beneficiaries are entitled to receive from the executors both the income and any increase in the total value of the estate above its value at the time it came into their hands. They are the only ones (except in case of the death of one of them) to whom the executors could distribute the increment so as to avoid the accumulation in their hands of property in excess of the total value of the property and assets that originally came to them under the will. This was unquestionably the intention of the testator. It could not apply to the residuary legatees; as to them (as there used) it would be meaningless, for the reason, that, at the time they are to receive anything (except in case of the death of one of the fathers) it provides for a distribution of the total estate among them, but not for any increment or increase alone. When they are thus to receive the estate nothing is to be left to accumulate in the hands of the executors. The reason for the reversal of the award of $10,000 allowed as increment was because no such an issue was raised by the pleading, and no such case tried and because the court did not deal with the estate *in solido,* which is the general rule in such cases. This rule is specially applicable here, where it is possible for the executors not to be possessed of any of the original property which came into their hands, and where the executors are enjoined (which makes it their duty) to distribute to the life beneficiaries the net annual income and increment of the estate so as to avoid the accumulation in their hands of property and assets in excess of the total value of the property and assets that originally came to them under the will.

We adhere to our former views in all matters covered by the original opinion. The petition for rehearing is denied.

Mr. JUSTICE WHITE dissents.

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[No. 6946.]

## BOND V. BOURK.

1. STATUTE OF FRAUDS—*Sale of goods*—An agreement by one person to construct an article for, and according to the plans of another, at an agreed price, is a contract for work and labor and not within the statute of frauds. *Ellis v. D. L. & G. R. R. Co.*, 7 Colo. App. 352, distinguished.

2. MEASURE OF DAMAGES—*Purchaser Refusing to Accept an Article Manufactured for Him According to His Plans*—The rule is practically universal in this country that where a purchaser refuses, without legal justification, to accept an article manufactured to his order, after special design, the vendor may, at his election, hold the article for the purchaser and recover the contract price with interest.

And the purchaser is not allowed advantage of the non-performance by the vendor of conditions, the performance of which he himself has prevented, *e. g.*, where, the article being a soda fountain, the defendant has refused to permit the plaintiff to install it, as the contract required.

Nor will the purchaser be allowed the benefit of a stipulation that some part of the price shall be paid in installments, at future times specified.

The tender of the article, and plaintiff's election to sue for the contract price, vests title in defendant for the purposes of the action.

*Error to Denver District Court.*—Hon. CARLTON M. BLISS, Judge.

Mr. HARRY E. KELLY and Mr. CHARLES H. HAINES, for plaintiff in error.

Mr. JOHN H. REDDIN and Mr. J. R. ALLPHIN, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

In substance the complaint alleges that on or about March 10th, 1908, plaintiff Bourk entered into an oral agreement with defendant Bond, to manufacture and deliver to the latter a soda water fountain of certain dimensions and particular design, to be manufactured by A. H. and F. H. Lippincott, of Philadelphia, except the marble counter and

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base and the superstructure and wooden base, which were to be made by the Eureka Marble Works and J. P. Paulsen, respectively, Denver firms, all in accordance with certain specifications furnished by the Philadelphia company; that defendant agreed, in payment therefor, to deliver to the plaintiff a certain second-hand soda water fountain and apparatus, of the agreed value of $126, and the sum of $930, $45 thereof in cash, $140 thereof on delivery of the new fountain, and the balance in equal monthly instalments, for which notes were to be given, payment to be secured on the fountain; that defendant, upon tender of the new fountain, refused to accept it, or permit it to be installed, or to make the cash payments, or execute the notes, or to in any way perform his part of the agreement; and that the fountain is held by plaintiff as the property of the defendant. The complaint also sets out a memorandum agreement in evidence of the oral one, which on its face appears to be a contract between A. H. and F. H. Lippincott and the defendant. It was on a printed form used by the Lippincotts, filled in to conform to the alleged agreement. It is further averred that the names A. H. and F. H. Lippincott, wherever they appear therein, should be erased and the name of the plaintiff inserted in lieu thereof. Damages were prayed at the agreed price of the fountain. The defendant admitted that he signed the memorandum agreement set out in the complaint, but denied that it was a contract with plaintiff; also admitted that he refused to deliver the old fountain or accept the new, or to permit plaintiff to put it up, or to make the cash payments or execute the notes, and denied all other allegations. The second defense is a general denial. The third defense alleges non-compliance with, and non-performance by plaintiff of, the provisions of the agreement. The replication puts in issue all new matter in the answer. A jury found for the plaintiff upon the issues tendered, and assessed his damage at $1,105.28, being the contract price with interest. Judgment was entered accordingly, and the defendant brings the case here for review on error.

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Defendant contends that there was no contract between himself and the plaintiff, as alleged, or at all; and further, that if the agreement set out in the complaint is held to be between plaintiff and defendant, still there was a failure by plaintiff to perform the conditions thereof binding on him, and no recovery can be upheld.

The jury, under full and correct instructions, found that the contract was made by the parties as alleged in the complaint, and also that plaintiff had fully complied with its terms, completed the fountain according to specifications, offered to deliver the same within the time specified, and set it up as required by the agreement. These findings have ample support in the evidence, and are conclusive on review. So that it must be accepted as settled that the contract is as set forth by plaintiff, and that he had fully complied, or was ready, able and willing to comply, with all of its provisions binding on him.

It is urged that there can be no recovery, because there was no sufficient written agreement between the parties, as required by the statute of frauds, that every contract for a sale of "goods, chattels or things in action" for the price of $50 or more shall be void unless a note or memorandum thereof be made in writing and subscribed by the parties to be charged therewith. Is the contract within the statute of frauds?

The fountain which the plaintiff agreed to manufacture and deliver was of particular dimensions and finished after a special design furnished by a third party. It does not appear that it was such an article as the plaintiff manufactured or produced for general trade purposes, nor does it appear that he manufactured such an article in the ordinary and usual course of business. The wood work was to be furnished by one party, the marble work by another, and the working parts by still another; all of which plaintiff contracted to assemble and deliver to the defendant, in the form of a complete new soda water fountain after a special design, peculiarly adapted

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delivery was to be made. The defendant objects to this instruction as improperly stating the rule. The plaintiff pleaded and proved a tender of the property constructed according to the terms of the contract, and an offer to set it up, in exact compliance with the agreement, and the jury so found. He also, to the satisfaction of the jury, established his ability and willingness to do this, and showed that the only reason for failure of delivery was the refusal of the defendant to permit him to set the fountain up, or to pay for or receive it on any terms or at all. The plaintiff then and there elected to hold the fountain as the property of the defendant and sue for the contract price, and gave notice accordingly. The rule is practically universal in this country, that where a purchaser refuses, without legal justification, to accept, when tendered, an article manufactured to his order, after a special and particular design, the vendor may, at his election, hold the property for the purchaser and sue for recovery of the contract price, such article being presumptively without a market value. The rule here announced as the measure of damage is intended to be limited to the particular facts of this case, and to cases involving a like or kindred state of facts. The English rule is different, and has been followed in two or three of our states, notably Maine and Vermont.

On the contention that no title passed to the defendant, the weight of authority is that, although a contract for a sale of a chattel provided that title should not pass until settlement is concluded, and it is accepted by the seller, still after a tender of delivery the seller may maintain an action for the agreed price. The tender of delivery and election to sue for the contract price vests title in the defendant, at least for the purposes of an action like this. Defendant repudiated his contract when he notified plaintiff that he would not receive or pay for the fixture, and would not permit it to be put up in his store; and he waived the conditions that the payments were not to be made or the notes executed until the fixture was set up. Plaintiff thereupon was entitled to sue for the

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contract price, without reference to the fact that the apparatus had not been set up; that is, the defendant cannot take advantage of the non-performance of the conditions by plaintiff which he himself has prevented him fulfilling. Plaintiff stands, and at all times has stood, ready to deliver the fixture, finished and set up precisely as agreed upon, and there is no apparent sound or valid reason why he should not recover the amount which the defendant specifically undertook to pay therefor. Plaintiff has obtained from the Lippincotts the working parts of the fountain, and Paulsen and the Eureka Marble Works have carried out their contracts with him, and he has either paid, or is obligated to pay, for the work so done and materials so supplied. Defendant is not liable to these parties; that liability is solely upon plaintiff, and they must look to him for their respective claims, and he in turn ought, as a matter of common fairness, to be saved harmless on his contract. The defendant alone is in default; he has deliberately repudiated his contract to the damage of plaintiff, and we are unable to see how a more just, natural or proper measure of that damage can be found than the amount named in the original contract and fixed as the actual value to the defendant of the article furnished. Under such circumstances substantial justice can only be done by permitting the plaintiff to recover the agreed price, which is, in effect, simply requiring the defendant to live up to his contract. If the defendant does not want the property, he is at liberty to protect himself, should he desire to do so, by disposing of it, and that burden is properly upon him, rather than upon the plaintiff. These conclusions are abundantly supported by the following well considered cases.—*Magnes v. Sioux City N. & S. Co.*, 14 Colo. App. 219; *Colo. Springs L. S. Co. v. Godding*, 20 Colo. 249; *Mitchell v. LeClair*, 165 Mass. 308; *Bookwalter v. Clark*, 11 Bissell (Fed.) 126; *Ballentine v. Robinson*, 46 Pa. 177; *Black River Lumber Co. v. Warner;* 93 Mo. 374; *Range Co. v. Mercantile Co.*, 120 Mo. App. 438; *Shawhan v. Van Nest*, 25 Ohio St. 490; *Crown Hill Vinegar and Spice Co. v.*

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*Wehrs,* 59 Mo. App. 493; *Bement v. Smith,* 11 Wend. (N. Y.) 492; *Schwarzer v. Karsch Brewing Co.,* 77 N. Y. Sup. 719; *Moore v. Potter,* 155 N. Y. 481; *Smith v. Wheeler,* 7 Ore. 49; *Register Co. v. Hill,* 136 N. C. 272; *American Soda Fountain Co. v. Gerrers' Bakery,* 14 Ok. 258; *Meagher Co. v. Cowing,* 149 Mich. 416; *McCormick Harvesting Machine Co. v. Markert,* 107 Iowa 340; *Kinkead v. Lynch,* 132 Fed. 692; *Gaar, Scott & Co. v. Fleshman,* 38 Ind. App. 490; 3 Sutherland on Damages, 3rd Ed., sec. 649.

The judgment is affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

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[No. 7297.]

## VAN GORDOR v. VAN GORDOR.

**ALIMONY—*Amount—Discretion of the Court*—Where a divorce is granted to the wife the amount of alimony to be awarded is in the sound discretion of the trial court. Its award will not be disturbed unless a clear abuse of the discretion is shown. An allowance to the wife, no longer able to perform hard labor, of a sum not exceeding one-half the net value of the husband's estate, acquired by their joint labors and economy, was held not only a proper, but a wise exercise of the discretion.**

*Appeal from Weld District Court.*—Hon. JAMES E. GARRIGUES, Judge.

Mr. H. E. CHURCHILL, for appellant.

Mr. JOSEPH C. EWING, for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court:

Plaintiff, appellee here, commenced this suit against defendant, appellant here, in the district court of Weld county, for divorce and alimony, basing her right of action on three grounds: First. That the defendant had been guilty of

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habitual drunkenness for the space of one year or more; Second. That he had been guilty of extreme and repeated acts of cruelty toward the plaintiff; and Third. That he had been guilty of adultery. The case was tried to the court without a jury, and defendant was found guilty of extreme and repeated acts of cruelty toward the plaintiff, and of adultery. A decree of divorce was awarded and plaintiff given a judgment for $8,000, as permanent alimony, also $100 for attorney fees in addition to $100 already allowed for that purpose. The judgment was made a lien against the real estate of the defendant, until within a time limit he should give a legal and sufficient bond on appeal to the supreme court, in the sum of $12,000, which bond was duly filed and approved.

From the judgment of the court awarding alimony the defendant brings the case here upon the ground that such award is excessive, contrary to law and not supported by the evidence. The evidence taken as a whole shows that the value of the defendant's property, at the time of the judgment, varied, in round numbers, from $20,000 to $24,000, according to the testimony of the defendant and his witnesses, and from $37,000 to $43,000, upon the testimony of the plaintiff and her witnesses; that the property consisted of an one hundred and sixty acre ranch with water rights, growing crops, ordinary farm machinery, livestock, work horses and the like. The evidence showed that the defendant was indebted in the sum of $9,000. If the testimony of the plaintiff be taken, the net value of the defendant's assets would be $35,300, one-half of which would be $17,650. According to the testimony of the witness Holland, sworn in behalf of plaintiff, the net value of the defendant's assets was $30,000, one-half of which would be $15,000. According to the estimate of the witness Farr, called by the defendant, the net value of the latter's estate was $14,700, one-half of which would be $7,350.

It is well established that the amount of alimony to be awarded in divorce proceedings is in the sound discretion of

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the trial court, and an appellate tribunal will not review that decision unless a clear abuse of such discretion has been shown.—*Boggs v. Boggs,* 45 Ind. App. 397; *Gussman v. Gussman,* 140 Ind. 433; and *Read v. Read,* 28 Utah 297. The rule is stated by Justice McCarty, in the case of *Read v. Read, supra,* as follows:

"The awarding of alimony and fixing the amount thereof are questions, the determination of which rests within the sound discretion of the trial court; and, unless it is made to appear that there has been an abuse of discretion on the part of the court in dealing with one or both of these questions, its judgments and orders granting or fixing the alimony will not be disturbed."

We have carefully examined all of the evidence, and reach the confident conclusion that it amply supports the award. From the testimony of the defendant, which in the very nature of things is quite as favorable to himself as it could be made, it appears that the net value of his estate was $14,700, one-half of which would be $7,350, only $650 less than the alimony actually decreed. Under the well established rule that appellate tribunals will not disturb judgments based on conflicting testimony, where there is sufficient in the record to support it, the award of alimony here should stand, as the discretion of the trial court seems to have been not only properly, but wisely exercised.

Upon the law of the case, natural justice requires that at least one-half of the property, representing the joint accumulations of husband and wife for a lifetime, should go to the wife, where she obtains a decree of divorce through the fault of the husband. Where, as in this case, the husband and wife have lived together until she is unable to perform hard labor, and have, by their joint labor, management and economy, acquired property sufficient to support them both comfortably when living together, certainly when the wife is forced by the misconduct of the husband to seek separation, she ought to receive sufficient property to support her comfortably, living

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alone, without reference to her ability to work and contribute to her own support.—*Gercke v. Gercke,* 100 Mo. 237; *Ressor v. Ressor,* 82 Ill. 442.

In many respects the case of *Gercke v. Gercke, supra,* is like the one at bar. There plaintiff and defendant had been married thirty-three years, and by industry and economy had accumulated an estate worth about $12,000. Plaintiff, who was fifty-seven years old and in poor health, had always been a faithful wife; defendant had treated her with great brutality and had been guilty of adultery. He was fifty-four years old, in robust health, and making money in his business. The wife had no means of support, and from her age and health was unable to earn anything. The trial court made an allowance of $6,000 alimony, which was sustained by the supreme court of Missouri. In the opinion of the court Justice Brace makes the following comment:

"That decree gives the plaintiff a moiety of the defendant's fortune. Is it under the circumstances too much? As before intimated, this fortune represents the joint labor, thrift and economy of thirty-three years of the married life of the plaintiff and defendant. The one equally with the other is the meritorious cause of its existence; by hard work faithfully performed by each, within their respective spheres, it was saved and laid by, from the rewards of their daily labor. They should have gone down to their graves in its mutual enjoyment; that they have not done so, is not the fault of the plaintiff; without fault upon her part, she has by the brutal and unfaithful conduct of her husband been deprived of the fruits of her toil and thrown upon the world with nothing but a little household furniture, the value of which is not worth estimating. Her age and the condition of her health is such that she can by her labor do but little towards making a support, and reduces to an inappreciable amount the suggested value of her inchoate right of dower when considered in connection with the age and health of the defendant. The husband is in possession of all the fruits of their joint labor; he has it in-

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vested in real estate and in a profitable and thriving business; he is in the enjoyment of vigorous and robust health, and "making bushels of money," as he expresses it. Under these circumstances it did not seem to the chancellor that it was anything but fair and just that the innocent, injured, and comparatively helpless wife should have a moiety of this estate, and now after the lapse of more than two years, during which time the defendant has refused to pay the moderate alimony *pendente lite* his appeal to this court, allowed her by the trial judge, or to contribute anything to her support, but has put her to the expense and delay of prosecuting two actions through the appellate court in order to get anything, we do not feel disposed to disturb his judgment."

It appears in the case of *Rcssor v. Rcssor, supra*, that the appellant was a capable, industrious woman, attending to her family, her house, cooking and working on the farm, doing a man's work besides, and had been a good manager; that the parties were married and had lived together for thirty-seven years, and she was fifty-nine years old at the time of the hearing; that when they were married neither had any property; and that through their joint efforts they had accumulated a comfortable fortune. It was vigorously contended by the husband, on appeal, in that case, that the wife should be limited to one-third of the income from his property. The facts there, and the contention of the attorney for the husband as to the amount of alimony, are substantially as here. There the court, among other things, at page 445, said:

"She in every way contributed equally to its (farm) improvement, and is fully entitled in equity, and the broadest principles of justice, in her declining years, to a comfortable support from it. She should not be put off with what will barely prolong her existence.

"It appears that she was fifty-nine years old at the time of the hearing, and was not in her former vigorous and robust health. She has probably passed the period when she will be able to perform much more physical labor. The infirmities

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of age must soon, according to the course of nature, render her at least comparatively helpless, and she must look to other sources than her own efforts for support. As we have seen, she has earned and is entitled to a comfortable support out of the joint accumulations of herself and her husband.

"In consideration of all the evidence, we regard the amount fixed by the court as being too small. Her board, we presume, would cost her two-thirds of the amount, and the remainder would seem to be a scant allowance to purchase and make her clothing, pay doctor's bills, and other contingent expenses. At her age, her ability to work should not be taken into account, as the infirmities of age may and soon will prevent that, and even if it were not so, she, after her life of hard and incessant toil to accumulate this property, has the right to spend her declining years in ease and comfort, freed from toil and effort. This she has earned, and is entitled to it.

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If so, one-third of the sum would be $500 per annum. But the court is not limited to a third of its income. This amount would not be unfair, unjust or unreasonable, even if it should require a sale of a portion of this property. Natural justice would say, that if she contributed equally to its acquisition, she has an equal right to its enjoyment. Independent of conventional law or usage, such would be the decision."

The foregoing cases deal with facts quite similar to those in the case at bar. Plaintiff and defendant started life as man and wife, practically without a cent. Their married life covered a period of thirty-one years; they reared a family of three children. Even after marriage, the wife worked in a hotel for $1.50 a week. They then settled on a homestead, and she taught school four miles from home for $50.00 a month, and boarded herself in order to pay the homestead fees. She walked the eight miles, to and from school. Later she went to cook and work out on a ranch, and stayed there for two years, until within one month before her first child

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was born. As soon as the baby was ten or eleven months old, she went back to the ranch to work, and cooked there for four years, all of her earnings going into the common fund. She assisted her husband on the farm, planting and harvesting crops, raising chickens, making butter and milking cows. One winter she fed the stock, while her husband worked away from home, and sold butter and eggs enough at the same time to support herself and the baby in his absence. After living in Kansas nine or ten years, they rented farms in Colorado for some time, and the first two or three years the wife worked in the field, the same as her husband. Everything that she acquired from the sale of butter, eggs, chickens and the like was turned into the family fund. She continued thus to perform labor, working and contributing to this fund for the period of twenty-seven years, until all of the property acquired and now held by the defendant was practically paid for. It is distinctively a common property, the joint product of the two. They then moved to the city of Greeley, in order to have educational advantages for their children. It was about this time that their troubles began, which finally led to this action. The defendant himself, in his testimony, bears witness to the devotion and fidelity of this faithful and patiently industrious wife in the accumulation of the family fortune, in this picturesque and convincing language: "My wife helped to accumulate this property, the water rights and the farm, and helped all along ever since we were married, about thirty-one years. I think she did her full share. Worked out and taught school when we were first married, milked cows and slopped hogs, and worked in the field. She cooked for hired men." It would be difficult to imagine a state of facts more emphatically calling for an application of the rule stated in and illustrated by the cases of *Gercke v. Gercke* and *Ressor v. Ressor, supra.* Under the circumstances disclosed by this record, it seems clear, as matter of law and upon the broadest principles of justice, that this woman is entitled to the full sum awarded, which, under all of the evidence, may

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be said to represent less than one-half of the net worth of the property, in the accumulation of which plaintiff has borne so conspicuous and helpful a part. Even had a larger sum been allowed her, it could have been, upon the entire record, fairly and justly upheld.

The judgment is affirmed.

Mr. JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 7908.]

## THE COLORADO AND SOUTHERN RAILWAY CO. v. THE STATE RAILROAD COMMISSION ET AL.

1. CONSTITUTIONAL LAW—*Particular Statutes*—The act for the appointment of a railroad commission (Laws 1907, 531, Rev. Stat. c. 121 art. vii.) is a constitutional enactment. *Consumers League v. Colorado &c. Co.*, 53 Colo. 54 followed.

2. ——*Delegation of Legislative Power*—The constitution prohibits the delegation of the powers of the legislature. A statute (Laws 1910 c. 5) required every railway company to furnish cars to shippers; to prescribe reasonable time schedules for the operation of trains; prohibited undue advantages to particular localities; and required the utmost diligence in the carriage of goods committed to them for transportation. Neither the number of trains to be operated, the time within which any train should run, or the equipment of the trains was specified. Other provisions of the act provided for the appointment of a commission charged with the administration of the statute, and authorized to direct what equipment should be supplied, what trains should be operated, and what other duties expressly or impliedly imposed upon common carriers should be exacted of them. *Held*, not a delegation of legislative power.

3. STATUTES—*Construction*—A statute which is essentially remedial, *e. g.*, the act creating the railroad commission (Laws 1910 c. 5) is to be liberally construed to accomplish its object.

The title of an act may be resorted to to aid in ascertaining the legislative intent.

4. ——*Construed*—The defendant railway company had abandoned the operation of that part of its railway between Breckenridge and Como, twenty-one miles in length, and operated only a combination train between Denver and Como. The effect was that all the freight between Denver, the commercial and political center of the state, and Breckenridge, a mining village of 800 souls, was required

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to pass by another railroad, a distance of 317 miles, breaking bulk on two occasions, and consuming several days; whereas if trains were regularly operated upon defendant's railway, the distance was only 110 miles, and the freight was received upon the day of its shipment. Passengers, too, were required to go by the same circuitous route, and one desiring to travel from Breckenridge to Como, only 21 miles by defendant's railroad, was required to travel nearly 400 miles. Moreover the freight charge, and the passenger rate, were greatly increased. *Held*, that under the act creating the railroad commission (Laws 1910 c. 5) the commission was authorized to require the defendant to resume the operation of its line between Como and Breckenridge, and to operate a passenger train, daily except Sundays, between Denver and Leadville by the way of Como and Breckenridge, and a through freight train at least three days in each week.

Section 11 of the amendatory act organizing the railroad commission (Laws 1910 c. 5), provided that three commissioners should be appointed by the governor, but with the proviso that those elected under the original act should continue in office for certain terms specified. *Held*, that the effect of the statute was not to create an office, and at the same time designate the persons who should fill it, but to retain the commissioners then in office by election of the people, excepting them from the operation of the power of appointment conferred upon the executive.

The constitution (art. XV, sec. 3) provides that the general assembly may alter the charter of any corporation theretofore granted, when in their opinion injurious to the citizens of the state, "but only in such manner that no injustice shall be done to the incorporators."

A statute (clause 6 sec. 602 Mills Stat.) provides that railroad companies organized under the act shall have power "to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor." *Held*, that the rights thus granted were not unlimited, and to be exercised without regard to the interest of the public; that the anticipated benefit to the public was the consideration of the franchise granted; that the acceptance of the grant by the corporation imposes upon it the obligation to operate its railroad, when constructed, in the manner and for the purposes contemplated by the statute; that the grant must be read in connection with the other provisions of the statute, and with the obligations which the law, independent of any statute, impliedly imposes, to furnish such service as may reasonably accommodate the public; that the surrender, either by constitutional or statutory provision, of the power of the state to reasonably control railroad companies is not to be inferred in the absence of positive words to that effect, and no such words are found either in the constitution or statute.

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*Held*, further, that to require a railway company to resume the operation of a portion of this railway which it had abandoned, even though such operation might be unprofitable, was not an injustice to the corporation, nor the taking of its private property without due process of law, where it appeared that the suspension of operation had occasioned and would occasion great inconvenience and additional burdens to the public.

5. RAILROAD COMPANIES—*Duty to Operate Constructed Lines*—Whether a railway company can be compelled to construct the line which it has adopted in its charter, *quaere*.

But a railway company may, where the public interest requires, be compelled to resume the operation of a part of its constructed line which it has abandoned, even though in fact such operation may be at a loss.

The railway company claiming that the operation of a particular branch or part of its railway will be unprofitable has the burden of proof.

The evidence examined, and held that the railway company had not sustained this burden.

The question of loss must be considered in connection with the duties of the railway company to the public, and the result of its corporate business, as a whole; it is not to be excused from performing its whole duty, merely because by ceasing to operate a part of its system the net returns will be increased.

6. RAILROAD COMMISSION—*Powers*—An order of the railroad commission requiring a railroad company to resume the operation of a branch of its railroad which it had abandoned, to operate passenger trains daily except Sundays, and three freight trains weekly, approved, and the decree of the district court enforcing the order affirmed.

*Error to Summit District Court.*—Hon. J. E. RIZER, Judge.

Mr. E. E. WHITTED, Mr. JOHN A. EWING and Mr. R. H. WIDDICOMBE, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, THEO. M. STUART, JR., assistant attorney general, for The State Railroad Commission.

Mr. BARNEY L. WHATLEY, for the Breckenridge Chamber of Commerce.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The Colorado and Southern Railway Company is a corporation organized under the laws of this state. It owns a

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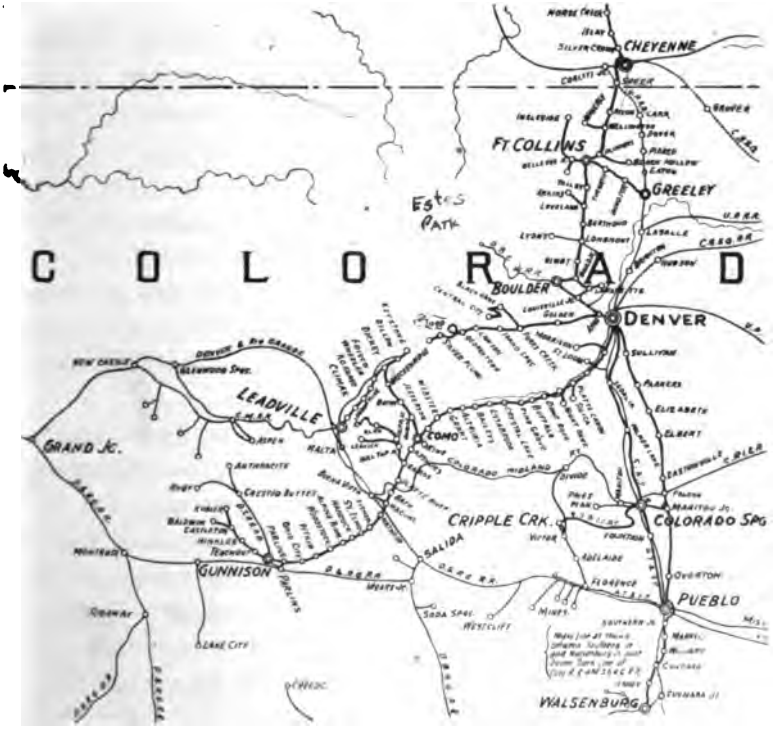
standard gauge line from Orin Junction, one hundred and fifty miles north of Cheyenne, Wyoming, extending southerly through Colorado to Denver, and thence to a point near the New Mexico-Texas line. In addition to this system, it owns a narrow gauge line, extending southwesterly up and along Platte Canon to Como, from Como over Boreas Pass, down into Breckenridge, then up and over Climax Pass into Leadville; also, a line extending from Como southwesterly through the town of Buena Vista to Gunnison, and thence to Baldwin, about twenty miles from Gunnison. This narrow gauge line is about three hundred and thirty-five miles in length, is known as the South Park division of The Colorado and Southern Railway Company, and is connected with, and forms a part of the system operated by the company as a whole. It is shown more particularly on the following map:

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The South Park line has been operated continuously previous to the winter of 1910-1911 by the railway company and its predecessors for about thirty years, during which period the service consisted of not less than one passenger train each way each day, from Denver to Leadville, and one freight train each way each day between the same points. In November, 1910, the railway company ceased to operate that portion of its line from Como to Breckenridge, and refused to receive or transport either passengers or freight over its road between these points. The service was then limited to a combination freight and passenger train between Como and Denver, and a similar service between Breckenridge and Leadville. In the summer of 1911 a passenger train daily, except Sunday, was operated between Leadville and Breckenridge, with a stub train from Breckenridge to Como, and a combination train from Como to Grant, connecting with a passenger train at the latter point for Denver. This service was continued until January, 1912, when the stub train between Breckenridge and Como was discontinued. In the meantime the passenger train from Grant to Denver was taken off, and a combination train run between Como and Denver. The passenger service between Breckenridge and Leadville was continued, and also a tri-weekly freight train between these points. By reference to the above map, it will be seen that passengers from Breckenridge for Denver were compelled to go to Leadville, and thence over the Denver & Rio Grande, via Pueblo, or over the Midland, via Colorado Springs.

In the latter part of 1911, the Breckenridge chamber of commerce filed a petition with the state railroad commission, setting forth the facts above narrated concerning the operation of trains down to that time, and charged that, unless restrained, the railway company, during the winter of 1911-1912, would cease to operate its road between Como and Breckenridge, and probably for all time to come; and that freight from Breckenridge to Denver, or *vice versa*, had to be shipped over the Denver & Rio Grande via Leadville and

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Pueblo. The petitioner asked that the railway company be ordered to operate its line between Como and Breckenridge, and to receive and transport freight between Denver and Breckenridge and all intermediate points, and provide an exclusive passenger service between Denver and Leadville, daily, including Sunday.

The railway company filed an answer, challenging the jurisdiction of the commission to make any order in the premises, denied that closing the road between Como and Breckenridge occasioned any damage to the citizens of Breckenridge and Summit county; admitted that it had declined to receive freight for transportation from Denver, through Como to Breckenridge, that such freight, when conveyed to Breckenridge, was shipped *via* other lines of road, through Colorado Springs and Pueblo to Leadville, and then reshipped to Breckenridge; admitted that it refused to receive for transportation any freight between Como and Breckenridge, consigned to Breckenridge; and had refused to receive and transport over its own line freight consigned to Breckenridge originating at Denver or points between Denver and Como. It then set forth at some length the physical character of its line from Denver to Leadville, the fact that it was built through a canon and over high mountain passes; that the grades and curves between Como and Breckenridge were excessive; that there was no business between these points; that the line was often closed by storms and snowslides, which imposed upon the company a heavy expense; that during the year 1910 the operation of the road betwen Como and Leadville resulted in a heavy deficit; that there was no prospect of an improvement of business over the line; that there was no necessity for operating a railroad between Como and Breckenridge, and not enough business between these points to pay the operating expenses of running trains and maintaining a road, and that the railroad facilities to and from Breckenridge via Leadville were adequate and conducted at a heavy loss.

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On the issues thus made the trial before the commission resulted in an order, directing the railway company, on or before the first day of January, 1912, and during a period of two years thereafter, to maintain, operate and conduct a through freight service between Denver and Leadville by way of Como and Breckenridge, at least three days each week; and also, from the same date and during the same period, to operate and maintain a through and exclusive passenger train service daily, excepting Sunday, between Denver and Leadville via Como and Breckenridge. The railway company declined to obey the order of the commission. Thereafter, proceedings were instituted in the district court to enforce the order of the commission, the state railroad commission and the Breckenridge chamber of commerce joining as plaintiffs in the case.

The complaint set out the order of the commission and the refusal of the railway company to obey it. It prayed for an order that the railway company be required to answer the petition, and show cause why the order of the commission should not be obeyed, and for an injunction or other process requiring the defendant to comply with the order of the railway commission. To this petition the railway company filed a demurrer, raising various questions, which was overruled. Thereafter the company filed its answer, wherein it pleaded three separate defenses which, in the main, raised the same questions presented by the answer filed with the commission, and in addition pleaded that the order of the commission, if enforced, would deprive the company of its property without due process of law. This answer will be noticed more in detail, so far as necessary, in the course of the opinion.

The cause was tried to the court on the testimony taken before the commission, and some additional evidence introduced by the respective parties. The facts thus established will be noticed later, in connection with the questions presented for determination. The court directed that an injunction issue, commanding the railway company to comply with

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the order of the railroad commission. The railway company brings the case here for review on error.

From the record and briefs of counsel, the questions presented for consideration are substantially as follows:

1. Whether the railroad commission act confers authority upon the railroad commission to make the order sought to be enforced.

2. Whether any of the members of the commission were legally chosen as members of that body.

3. Whether, if the commission was validly chosen, and is a legal and constitutional body, its order is, in effect, the exercise by the commission of legislative power.

4. Whether the constitutional and statutory provisions of the state in effect at the time the plaintiff in error was organized, required it to operate the abandoned portion of its line.

5. Whether, if it be conceded that the commission had power to make the order complained of, the act of 1910, giving this power, is constitutional; that is, whether the act and the order by the commission do not amount to an impairment of the plaintiff in error's charter or contract rights; and

6. Whether the order of the commission in effect is so oppressive, unjust and unreasonable, if enforced, as to result in taking the property of the plaintiff in error without due process of law, and without just compensation, contrary to the constitution of the United States.

Counsel for plaintiff in error contends that the act of 1910, by virtue of which the railroad commission acted, does not confer upon the commission the power or authority which it exercised, in that it does not confer authority upon the commission to order the resumption of traffic over an abandoned line, and particularly, does not confer authority upon that body to say what number of freight trains shall be operated, and that it has no authority whatever to direct the movement of passenger trains. In other words, counsel for plaintiff in error contends that with respect to freight trains, the au-

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thority of the commission is limited to orders directing a railroad company to provide a sufficient number of cars to transport its freight traffic, a reasonable time schedule for such trains, to require such repairs to be made and to provide such equipment as will be necessary and within the reasonable power of the railroad to make or adopt for the promotion of the security of persons as to life and limb, or for the convenience and accommodation of the public in the handling and shipment of property; and as to passenger trains, that the authority of the commission is limited to orders requiring a railroad company to make such repairs and provide such reasonable equipment as may be necessary for the safety of persons as to life and limb. The sections of the act, Laws 1910, pages 45 *et seq.*, upon which this contention is based, are as follows:

"Sec. 2. The term "common carriers," as used in this act, shall also include express companies, private freight car lines and pipe lines. The term "railroad," as used in this act, shall include all bridges used or operated in connection with any railroad, and also all the roads in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and shall also include all switches, spurs, tracks and terminal facilities of every kind, used or necessary, in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any such property; and the term "transportation" shall include all cars and all other vehicles and instrumentalities and facilities of the shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, demurrage, storing, or handling of property transported, and it shall be the duty of every common carrier, subject to the provisions of this act, to provide and furnish such transportation upon reasonable request therefor, and to establish through

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routes, and just and reasonable rates applicable thereto, and to provide a sufficient number of cars and a reasonable time schedule for trains."

"Sec. 25. It shall be the duty of every common carrier to transport any and all shipments between points in this state with the utmost diligence, and to move livestock and perishable products towards destination continuously, without unnecessary delays, or longer stops than, or regular stops at stations, or stops for feeding, icing, or watering, and at a minimum speed of not less than ten miles per hour. * * *."

"Sec. 27. If, in the judgment of the commission, after a careful personal examination and investigation, and after a hearing before the commission, or the opportunity for such hearing, the commission shall find that repairs, improvements or increased facilities in respect to roadbed, trackage, rolling stock, sfations and depots, yards, terminal facilities, switches, signals, or any other element of the service of any common carrier shall be necessary and within the reasonable power of any common carrier to make or adopt for the promotion of the security of persons as to life and limb, or for the convenience and accommodation of the public, in the shipping and handling of property, the commission shall make such reasonable order requiring any common carrier to do any such thing deemed by the commission to be proper in respect to such matters within a reasonable time, to be fixed by the commission, as to them shall seem so necessary, and so within such reasonable power of such common carrier; and the orders of the commission in such respect shall be enforced by the proper writs and orders of courts of common jurisdiction."

One of the defenses interposed and upon which the railway company justifies its action in abandoning the portion of its road between Breckenridge and Como, which is twenty-one miles in length, is, that on account of the altitude, heavy grades and sharp curves, trains can not be operated over it except at a heavy loss. Eliminating, for the present, this feature of the case, we will consider, first, the contention with

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respect to ordering the resumption of trains over the abandoned portion of the road, and the authority of the commission to direct what freight trains shall be operated between Leadville and Denver; and, second, the authority of the commission to order the operation of exclusive passenger trains between these points.

The questions involved in the first propositions are closely related and can be considered together. It appears from the testimony that perishable, as well as other, articles of property are shipped from Denver to Breckenridge, and likewise from Breckenridge to Denver. The route by which they are now shipped is over the Denver & Rio Grande Railroad, a standard gauge line, via Pueblo and Leadville to Breckenridge, and from Breckenridge to Denver over the same route, a distance of 317 miles. At Leadville a shipment from Denver to Breckenridge must be transferred to narrow gauge cars and hauled to Breckenridge, while shipments to Denver from Breckenridge, or other points between, must be reloaded from narrow to standard gauge cars. From Breckenridge to Denver, over the narrow gauge line is 110 miles. In order to make a shipment from Breckenridge to Como, the cars in which freight is transported are hauled to Leadville, where the articles being transported are loaded into standard gauge cars, and from thence taken via Pueblo to Denver, where the shipment must again be transferred to narrow gauge cars and hauled over the South Park division to Como, a distance of something like four hundred miles, in order to reach a point distant only twenty-one miles from the place of shipment.

In addition to this it is also proper to note that Denver is the capital and commercial center of the state; that the mail, express and passenger service between Denver and Breckenridge and *vice versa* is now between fourteen and twenty hours, where, prior to the abandonment of the service from Como to Breckenridge, it was between six and seven hours; that passengers traveling between these places must pay additional fares above that paid when the South Park line was

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operated from Denver to Leadville; that it now takes from four to five days to transport freight from Denver to Breckenridge via Leadville, when, before, freight from Denver would reach Breckenridge on the same day it was loaded on the cars. This was important to the citizens of Breckenridge in view of the fact that perishable articles, in many instances, could be shipped by freight instead of by express, as they generally must be when transported via Leadville. It is apparent that the change necessitates residents of Breckenridge paying the difference between freight and express rates on perishable articles of merchandise. It also appears from the testimony that after the company ceased to operate its line between Breckenridge and Como, it refused to furnish cars at stations between these points in which to ship ores, or transport supplies to such points, and that on this account, at least one mine could not be operated unless a wagon road was constructed to Breckenridge at a cost of about ten thousand dollars; and that it cost the operators of another mining property between Breckenridge and Como a dollar and a half per ton more to haul by wagon to Breckenridge than it did to haul it to a switch or spur where ore was received for shipment before the line between Breckenridge and Como was closed.

On the subject of freight and express, the commission, in its finding and order, said: "The defendant urges that it is offering, as a compensation to the patrons of their road, a through route around by way of Colorado Springs or Pueblo, but is this adequate compensation? It was testified to by the witnesses that when this line was operated as a through route from Denver to Leadville, that a merchant could order his merchandise in the evening in Denver and receive the same the next morning in Breckenridge or Leadville by freight. Now all perishable merchandise must be sent by express, if it goes over defendant's line; and if sent by freight it takes from three to six days to go around by the way of Pueblo or Colorado Springs, and may thus be destroyed." That the change in the operation of the road causes delay, and works

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a great inconvenience to the inhabitants of Breckenridge, imposes upon them additional expense in obtaining perishable articles from Denver, and at least embarrassed the operation of mines located between Como and Breckenridge, is manifest. These results are caused entirely by the refusal of the railway company to operate trains over its twenty-one miles of track between Como and Breckenridge. Eliminating, as we have said, for the present any valid reason which might excuse the railway company from operating its twenty-one miles of railway between Como and Breckenridge, ample authority is found in the sections of the act quoted, as well as others, for the commission to direct traffic to be resumed over this abandoned portion of the road, and what freight trains shall be operated over it.

In section 2 of the act, it is made the duty of every common carrier, subject to the provisions of the act, to furnish transportation, to establish through rates, to provide a sufficient number of cars, and a reasonable time schedule for trains. By section 25 it is made the duty of a railroad company to transport all shipments between points in this state with the utmost diligence, and to move perishable products without unnecessary delays; while, by section 27, the railroad commission is empowered to require a railroad company to furnish such facilities for the convenience of the public for shipping and handling property as, in the judgment of the commission, is necessary and within the reasonable power of the railroad company to furnish.

The prime purpose of these provisions is to impose upon a railroad company, in its capacity as a common carrier, the duty to afford shippers reasonable facilities for the transportation of property without unnecessary delay. Merely furnishing cars would not effect this object. They must be moved, and hence, we find the act requires the common carrier to transport shipments with the utmost diligence; and if it fails in this particular, the commission, by virtue of the provisions of section 12 of the act which empowers that body to enforce

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its provisions, may require it to furnish such facilities within its reasonable power as may be necessary, in order to compel it to discharge its duty to the public. Clearly, then, if a railroad company does not operate a sufficient number of trains to reasonably serve the needs of shippers, the commission has the power to direct it to increase its service in this respect; or, if it operates its trains over such routes, by reason of a link in its line being abandoned, that unnecessary delays are occasioned, it is not transporting shipments with that degree of diligence which the act requires, and the commission, by virtue of the provisions of sections 12 and 27, is empowered to direct that it transport freight over the abandoned part of its line, when by so doing shipments will be greatly facilitated, and burdens imposed upon shippers removed, unless the railroad can justify its action in abandoning such part of its line—a proposition we shall consider later.

Counsel for plaintiff in error contends the act does not authorize the commission to direct the running of passenger trains. In express terms it does not, but the act is essentially remedial, and will, therefore, be liberally construed to accomplish its object.—*Consumers' League v. Colorado & Southern Ry. Co.*, 53 Colo. 54; 125 Pac. 577. The settled canons of judicial construction require that possible interpretation to be given a statute which will render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably ascertained. The title of an act, although not declaratory of the law, which must appear in the act itself, may, nevertheless, be resorted to for the purpose of ascertaining the legislative intent. By reference to the title of the act under consideration, it will be found that its object, among other things, is to create a state railroad commission, to prescribe and define its duties, to insure an adequate railway service, and to exercise general supervision over the conduct and operations of common carriers. From this title, declaring as it does, that the purpose of the act is to regulate common carriers, and to this end, to "insure an adequate railway serv-

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ice," it must be presumed that the purpose of the general assembly, in passing the act, was to require common carriers to provide each locality along its line with adequate passenger service, unless the contrary clearly appears in the body of the act.

Turning to section 5 of the act, we find it provides "That it shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or concerning any particular description of freight traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation or locality, or any particular freight traffic, to any undue or unreasonable prejudice or disadvantage in any such respect whatsoever * * * ."

According to the title of the act, one of its objects was to insure an adequate railway service. Such service is not limited to freight traffic, but embraces the transportation of both passengers and freight. That it was clearly the intention of the legislature to make the provisions of the act applicable to both freight and passenger traffic, is made clear by section 1, which states: "That the provisions of this act shall apply to any corporation or to any person or persons who shall be held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property by railroad from one point or place within the state to any other point or place within the state." By section 2 of the act, although somewhat ambiguous on the subject, we think it is made the duty of a railroad company to furnish, upon reasonable request, sufficient cars for the transportation of passengers and establish through routes for that purpose. This view is strengthened by the next section, which states that "All charges made for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, shall be just and reasonable," thus manifesting an in-

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tention on the part of the legislature, in connection with the declaration in section 1, to the effect that the act applies to carriers engaged in the transportation of either property or passengers, to exercise a reasonable control over a railroad with respect to the transportation of passengers. By section 5 as above noted, a railroad company is inhibited from subjecting any locality to any undue or unreasonable disadvantage. By section 12, authority is conferred upon the commission to execute and enforce its provisions. If the company, by operating its passenger trains, or refusing to operate them, over a portion of its road, brings about a result which the law inhibits, then it is not only violating the law, but imposing upon a community a disadvantage which the act intended to prevent. The fact that passengers from Breckenridge to Denver must travel to Leadville, and thence to Denver over the Denver & Rio Grande via Pueblo, or over the Colorado Midland via Colorado Springs, and in returning, travel the same circuitous route, a distance in the one case of 317 miles, and in the other of 253 miles, when the distance over the direct line of the South Park is but 110 miles, and that by traveling over these routes to and from Denver, they must pay additional passenger fares, and suffer loss of time, much in excess of that required when the line between Como and Breckenridge was operated, or that persons at Breckenridge, desiring to reach Como by rail, would have to travel to Denver over one or the other of the lines indicated, and then from Denver to Como, a distance, in all, of several hundred miles, in order to reach a point but twenty-one miles distant, manifestly subjects Breckenridge to an unreasonable disadvantage, which is the direct result of the railroad company abandoning that portion of its road between Como and Breckenridge. With the act expressly inhibiting a railroad company from subjecting a locality to an undue disadvantage, and with express authority conferred upon the commission to enforce the provisions of the act, we think it has power to direct the railroad company

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to operate passenger trains over its line to Denver, so that the disadvantage imposed upon the inhabitants of Breckenridge by the railroad company abandoning its line between that point and Como will be removed, provided, of course, the company can not justify its action in abandoning that portion of its road.

The first railroad commission act was passed in 1907—Laws 1907, p. 531. By section 11 of that act, the governor was empowered to appoint three commissioners to serve until January, 1909. This section further provided that at the general election in 1908, three commissioners should be elected, one for the term of two years, one for four years, and one for six years, for terms beginning in January, 1909. At the general election in 1908 Commissioners Anderson and Staley were elected for the respective terms of six and four years. At the general election in 1910, Commissioner Kendall was elected for the term of six years, from January, 1911. These gentlemen, by virtue of these elections, constituted the railroad commission when the proceedings were commenced which afterwards resulted in the case now under review, being instituted in the district court, and also at the time that case was commenced and judgment entered.

In 1910 the general assembly, at a special session, passed the railroad commission act now in force. By its terms it purported to amend, and as amended, to re-enact the act of 1907. Section 28 of the new act recites: "All acts and parts of acts inconsistent herewith, are hereby repealed. All parts of the act hereby amended and not re-enacted in this act, are hereby repealed." By section 11 of the new act, it was provided: "That a commission is hereby created and established, to be known as "The State Railroad Commission of Colorado," which shall be composed of three commissioners who shall hereafter be appointed by the governor, by and with the consent of the senate, provided that the three commissioners who were elected in November, 1908, shall be the commissioners hereunder for the terms for which they were elected:

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that is to say, Worth L. Seeley shall be a commissioner to serve until the second Tuesday in January, 1911, Daniel H. Staley shall be a commissioner to serve until the second Tuesday in January, 1913, and Aaron P. Anderson shall be a commissioner to serve until the second Tuesday in January, 1915." Section 1 of the act of 1907 exempted from its operation mountain railroads operating less than twenty miles of road, the principal traffic of which was the hauling of mineral from, and supplies to, mines.

Under these provisions it is contended (1) that the act, on account of exempting mountain railroads of the character mentioned, is in violation of the constitution of the United States, which forbids any state to deny any person the equal protection of the laws; and (2) that as commissioners were elected under the act of 1907, they are without authority to enforce its provision if the act is unconstitutional: (3) that inasmuch as the act of 1910 repealed all parts of the original act not re-enacted, Kendall's election was invalid; (4) that by the act of 1910, it was provided that the commissioners should thereafter be appointed by the governor, by and with the consent of the senate, and that the proviso to which we have referred under which Commissioners Anderson, and Staley, were continued in office, is invalid, for the reason that the legislature is without power to create an office not connected with the legislature itself, and in the same act designate the person who shall fill that office.

The constitutionality of the act of 1907 is settled by the decision of this court in the *Consumers' League case, supra,* and it is unnecessary to discuss that question here. This conclusion renders it unnecessary to consider the second proposition.

The validity of Commissioner Kendall's election is settled in *Kendall v. People,* 53 Colo. 106; 125 Pac. 586, and is no longer open to question.

The fourth proposition is clearly without merit. It is true, that the act of 1910 provides that the members constitut-

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ing the railroad commission should be appointed by the governor, but it expressly exempted from its operation Commissioners Anderson and Staley, by declaring that they should continue in office under their election until the terms for which they were respectively elected expired. By so doing, the legislature did not, as contended, create an office, and in the same act designate the persons who should fill it, for the very obvious reason the act simply provided, so far as Commissioners Anderson and Staley were concerned, that the governor, although empowered to appoint the railroad commissioners, instead of being elected, as the act of 1907 provided, should not exercise that power as to these two commissioners until their respective terms for which they had been elected had expired.

The next point urged by counsel for plaintiff in error for us to consider is to the effect that if the act of 1910 confers upon the commission authority to make the order involved, then the order is an exercise of legislative power on the part of the commission, and is unconstitutional and void. Our state constitution inhibits the delegation of legislative power to a body like the railroad commission—art. 3; art. 5, sec. 1, and the amendment to sec. 1, Laws 1910, p. 11.

Section 27 of the railroad commission act empowers the commission to make such orders with respect to increased facilities as in their judgment may be necessary and within the reasonable power of any common carrier to adopt for the convenience of the public, in handling property, and to "make such reasonable order requiring any common carrier to do any such thing deemed by the commission to be proper, in respect to such matters within a reasonable time, to be fixed by the commission as to them shall seem so necessary, and so within such reasonable power of such common carrier." In support of the proposition under consideration, it is urged that the law does not specify what increased facilities shall be furnished by a common carrier, that it does not direct trains to be run daily, or that all parts of a line shall be operated,

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or that trains shall move at any particular time, and that whatever is necessary with respect to these matters, is not determined by the law, but rests in the judgment of the commission. In other words, the contention is, that the duties imposed upon a common carrier do not exist until the commission makes an order, and that the extent of the duty of a carrier and whether it exists or not, arises wholly out of the order of the commission. In determining this proposition, there are other portions of the act which should be considered.

By section 2, a common carrier is required to furnish cars to shippers, and to fix reasonable time schedules for trains. By section 5 a common carrier is inhibited from giving any particular locality an undue advantage, or to subject any locality to an undue disadvantage. By section 25 a railroad company is required to transport shipments with the utmost diligence; and by section 12, a commission is created, with authority to execute and enforce its provisions. It is true, the time within which, or the number of trains that shall be run, or the equipment of trains, has not been specified in the act in detail; but the purposes of the act in imposing the duties upon common carriers to which we have referred, was to compel them to furnish an adequate railway service. To this end power is conferred upon the commission to execute the law. The general assembly has passed the law, but it has not conferred upon the commission the power to make or unmake the law, in any respect. That body is merely charged with the administration of the law by directing in a proper case what equipment shall be supplied, what trains shall be run, and what other requirements expressly or impliedly imposed on common carriers they shall perform and observe in scribed; so that the authority of the commission is limited to administering the law prescribed by the legislature, by ascertaining, as a fact, whether its provisions are violated, and if violated, to enforce them. This is in no sense the exercise of

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a legislative power, but its purpose is to afford a means to aid in carrying the law into effect.—*C. & N. W. Ry. Co. v. Dey,* 35 Fed. 866; 2 Wyman on Public Service Corporations, sec. 1403; *C., B. & Q. R. R. Co. v. Jones,* 149 Ill. 361 (378); *State v. R. R. Co.,* 38 Minn. 281.

In other words, while it is true the general assembly can not delegate the power to make a law, it may, however, make a law delegating the power to determine some fact or a state of things upon which the law, as prescribed, makes its action depend.

On behalf of plaintiff in error it is urged:

(1) That its charter is permissive, and does not require it to operate and maintain an unproductive line.

(2) That the order of the state railroad commission, directing the operation of through freight and passenger trains between Denver and Leadville, impairs the obligation of contract, in violation of the constitution of the United States, art. I, sec. 10, and the constitution of Colorado, art. II, sec. 11.

(3) That the order of the commission takes the property of the plaintiff in error without due process of law, and denies it the equal protection of the law, in violation of the fourteenth amendment to the constitution. These propositions can be considered together, as they involve, to a considerable extent, a consideration of the same propositions of law and fact.

In support of the proposition that the charter of the railroad company is purely permissive, and that the company can not be compelled to operate an unproductive line, the following constitutional provisions and statutes are relied upon:

Art. XV, section 3, of our constitution, provides, in substance, that the general assembly may alter any charter of a corporation thereafter created, when, in their opinion, it may be injurious to the citizens of the state, but only in such manner that no injustice shal be done to the incorporators. Section 4 of the same article provides that railroads shall be public highways, and that any corporation organized for the purpose shall have the right to construct and operate a railroad

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between any designated points within this state. Section 6 of the same article provides that all individuals and corporations shall have equal rights to have persons and property transported over any railroad in the state, and that no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight in this state.

Section 599 Mills' Stats. provides that five or more persons may form a company for the purpose of constructing a railroad, and that their certificate of incorporation, among other things, shall state:

"First: The place from and to which it is intended to construct the proposed railway."

"Second: The time of the commencement and the period of the continuance of such proposed corporation."

Section 602 *ibid* provides that such corporation shall have the power:

"First: To lay out its road, not exceeding two hundred feet in width and to construct the same * * * ."

"Fourth: To receive and convey persons and property on its railway.

Fifth: to erect and maintain all necessary and convenient buildings and stations, fixtures, and machinery for the convenience, accommodation and use of passengers, freights, and business interests, or which may be necessary for the construction or operation of said railway.

Sixth: To regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor."

By the next section it is provided that if any railway corporation shall not, within two years after its articles are filed and recorded, begin the construction of its road, and expend twenty per cent of the amount of its capital within five years after the date of its organization, its corporate existence and powers shall cease.

By section 614 *ibid* it is provided that where the property and franchises of any railroad company organized and exist-

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ing under the laws of this state shall be sold and conveyed under any power contained in any trust deed or mortgage, or pursuant to the judgment or decree of any court of competent jurisdiction, it shall be lawful to organize a railroad company under the laws of this state for the purpose of purchasing, maintaining and operating the property so sold and conveyed.

By the section following it is provided that the railroad company so organized shall have power to acquire the property and franchises sold and conveyed, as contemplated in the preceding section, and to enjoy all the estate, franchises, rights, powers and privileges in law or equity of the corporation whose property and franchises have been so sold.

By section 632 *ibid* provision is made for a railroad company, upon a vote of two-thirds in value of its stockholders, at any meeting thereof, to amend its articles of association, so as to change its termini, and when so determined, to amend or alter its articles of association, such amendments, when filed in the offices where they are to be recorded, shall have the same force and effect as though such amendments had been included in and made a part of, and embraced in the original articles of incorporation.

By section 3703 *ibid,* authority is conferred upon a railroad company to make a new location of its line, and that where such location is made, the previous right of way shall revert to the owner of the land through which such right was granted, on payment to the railroad company of the amount assessed by the board of appraisers and paid by the railroad company for its previous right of way.

The plaintiff in error was organized in 1898, and in 1899 purchased the narrow gauge lines exhibited on the map at a sale ordered under foreclosure proceedings against The Denver, Gunnison & Leadville Railway Company, the former owner of this property.

The alleged impairment of the obligations of a contract by the order of the commission, in directing the operation of through freight and passenger trains is based substantially

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upon the statutory provision above noted, to the effect that a railroad company, organized under the laws of this state, has the power to regulate the transportation of both passengers and freight, and compensation therefor, and the constitutional provision that in changing the charter of a corporation injustice shall not be done to the incorporators.

The third proposition is based substantially upon the ground that the order of the railroad commission cannot be complied with except at a heavy loss to the company.

The testimony shows that the grades between Breckenridge and Como are steep, the curves sharp, and that by reason of the high altitude between these points which, in places, is above timber-line, the operation of the road between Breckenridge and Como is expensive, for the reason that a locomotive can only handle a light tonnage; and that in the winter snow must be shoveled from the track which at times accumulates to such an extent as to stop traffic for a considerable time.

On the subject of losses incurred in operating the entire South Park system for several years prior to 1902, elaborate tables are submitted, from which it appears the loss has been great. The same result appears from the operation of the road between Como and Leadville, and Breckenridge and Leadville. In computing losses, taxes and interest on bonds and investments are charged, although eliminating these items, the tables mentioned show a loss. Our attention is not directed to any testimony from which it is made to appear what losses (if any) the company would suffer in operating trains between Breckenridge and Como, in compliance with the order, above that which it now claims to suffer in operating its line from Breckenridge to Leadville. The company does not claim a loss will be incurred in operating trains as directed by the commission, because they are not necessary to accommodate the freight and passenger traffic from Breckenridge to Denver.

The evidence establishes that for the years 1906 to 1911, both inclusive, the net earnings of the company on its entire

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system ranged from $1,897,000 to $2,876,000, and that during this period the following dividends were paid: 1906, $340,000; 1907, $680,000; and that for each of the years 1908 to 1911, inclusive, $1,300,000.

Breckenridge has a population of over eight hundred. We have already called attention to the inconveniences and expenses imposed upon the people of Breckenridge and vicinity resulting from closing the road between that point and Como. As we understand the record, the rates charged for freight shipped to Denver under the arrangement by which the railroad company handles that traffic via Leadville over the Denver & Rio Grande are the same as previously charged when transported over the South Park from Breckenridge to Denver. Passengers from Breckenridge to Denver, however, must pay an additional charge proportionate to the increased distance they travel in going via Leadville, as compared with the distance between Breckenridge and Denver over the South Park line. The time consumed is much greater, by many hours, than it would be by going direct over the South Park. In addition, the people of Breckenridge, in some instances, at least, must pay express rates on perishable merchandise, instead of freight rates, as before.

In support of the contention on the part of plaintiff in error that the judgment of the district court is erroneous, when tested by the several propositions under consideration, it is urged that the right to build and operate a railroad in this state is purely permissive; that the statutes do not impose any obligation upon a company owning such road to operate it at a loss; that when the plaintiff company was organized, the statute empowering railroad companies to regulate the time and manner in which passengers and property should be transported over their lines and the compensation to be paid therefor, was in force; that this section was, in effect, a part of its charter; that to now require the company, either by virtue of the railroad commission act or the order of the commission, to operate trains in accordance with such order de-

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prives it of a contract right; that this cannot be justified under the authority vested in the general assembly to change the charter of a corporation, because a change is inhibited which will do an injustice to the incorporators; and that compelling the plaintiff in error to operate its road between Leadville and Denver at a loss violates federal and state constitutional provisions, because thereby its property is taken without due process of law, and it is compelled to devote its property and revenues to a public use without compensation.

In considering these several questions, the first important question of fact to determine is, whether or not the record discloses that a compliance with the order of the commission subjects the company to a substantial loss. In considering this question, it should be borne in mind the company does not claim that the trains directed by the commission are not necessary to accommodate the freight and passenger traffic between Breckenridge and Denver, but bases its right to be excused from complying with the order upon the ground that to operate the trains ordered causes a loss which it should not be required to suffer, when a freight and passenger service is provided via Leadville. The company claims that the operation of its trains from Breckenridge to Leadville entails a loss. The record does not disclose what loss, if any, would be caused by operating trains between Breckenridge and Como in compliance with the order of the commission, above that which the company now claims to suffer by operating its line between Breckenridge and Leadville. With trains, both freight and passenger, only operated between Breckenridge and Leadville, it is fair to assume that the company only receives a portion of the freight and passenger charges which shippers from Breckenridge to Denver, and passengers to and from the same points, must pay for transporting freight and as passenger rates; and that if the order of the commission were complied with, the company would receive the entire revenue derived from both passenger and freight traffic between Breckenridge and Denver, in place of the portion it now receives for han-

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dling this traffic from Breckenridge to Leadville. Manifestly, the change in the operation of its road as ordered by the commission would increase the revenue of the company, as it would thus receive on both the freight and passenger traffic between Breckenridge and Denver the charges for such traffic over its own line for the entire distance between these points, instead of the amount which it receives therefor for the short haul between Breckenridge and Leadville. This additional revenue might materially reduce the loss which the company now claims to sustain in operating its trains between Breckenridge and Leadville. Clearly, if the company relies upon the ground that the order is unreasonable because a compliance therewith entails a loss, the burden is upon it to establish such loss as a fact. This it has failed to do.

If, however, we assume the record discloses that a compliance with the order of the commission will entail a substantial loss, in excess of the revenues derived from the operation of the trains ordered, then we think that neither this fact nor any of the propositions to be considered in connection with it justify a reversal of the judgment. In considering losses, we deem it pertinent to suggest that interest on bonds and investment should not be taken into account, as the amounts representing these items could not be materially different, whether the road was operated or not. Taxes might be less on an abandoned road than one in operation.

It may be (but we do not so decide because not involved) that a railway company can not be compelled to build a projetced line. That, however, is a radically different proposition from compelling it to maintain and operate a line which has been constructed in accordance with its charter and thereafter operated, but which it ceases to operate in order to reduce expenses. It must be remembered that railways are corporations organized for public purposes, have been granted valuable franchises and privileges, and that primarily they owe duties to the public of a higher nature even than that of earning large dividends for their shareholders.—*United States*

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*v. Trans-Missouri Freight Association,* 166 U. S. 290 (332). The franchise which plaintiff in error obtained by incorporating under the laws of this state was not granted for its profit alone, or that of its stockholders, but, in a large measure, for the benefit of the public, and while it is a private corporation, the public is interested in the business in which it is engaged in the capacity of a common carrier. In this capacity it is a public servant, and amenable as such.—*People ex rel. v. C. & A. Ry. Co.,* 130 Ill. 175.

It is undoubtedly true that a railway company, in the absence of a statute limiting its power, is vested with a wide discretion in operating its line of road; but this discretion is not absolute. It must be exercised with due regard to the welfare of the public.—*People ex rel. v. C. & A. R. R.; supra.*

At the time the plaintiff in error was organized and when it purchased the South Park system, the statute did grant it the right to regulate the time and manner in which passengers and property should be transported over the lines of that system; but this did not confer upon it the unlimited right to operate its trains as it saw fit, without regard to the interest of the public. This grant of power must be read in connection with the obligation which the law, independent of the statute, impliedly imposed upon it to so operate its trains and furnish such service as would reasonably serve the needs of the public. The right of a state to reasonably control a railroad company in the operation of trains, within its jurisdiction, will not be considered as having been surrendered either by statute or constitutional provision, in the absence of positive words to that effect, or their equivalent in law. There is nothing in either the statutes or the constitution of the state to indicate the intention to surrender such control; so that simply granting to a railroad company the right to fix the manner of running its trains does not deprive the state of its power to act upon the reasonableness of its action in this respect.—*Railroad Commission case,* 116 U. S. 307. The con-

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stitution of the state inhibits the general assembly from so changing the charter of a corporation as to work injustice to the incorporators; but in our opinion this provision is not applicable. Merely requiring the railroad company to observe the obligations which the law imposes upon it to reasonably serve the public, by either the terms of the Railroad Commission Act or the order of the commission, by virtue of the authority vested in them, is nothing more than requiring it to comply with its legal obligation. This does not invade any constitutional right, neither does it work an injustice to the incorporators.

As previously stated, the railroad company does not claim that the service ordered is unnecessary, except upon the ground that operating its trains between Breckenridge and Leadville affords a service which ought to excuse it from complying with the order of the commission. We have called attention to the fact that refusing to obey the order of the commission subjects the people of Breckenridge and vicinity to great inconvenience, pecuniary loss, and loss of time; and this brings us to a consideration of the question of whether or not compelling the railroad company, under these circumstances, to operate its trains between Leadville and Denver, by resuming the operation of its line between Como and Breckenridge, at a substantial loss, deprives it of its property without due process of law, and requires it to devote its property to a public use without compensation. Unquestionably, railroad property is protected by constitutional guaranties, but these rights are not abridged by being subjected to reasonable governmental power of regulation.—*Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262. The consideration for the franchise, rights and privileges granted a railroad company by a state is the resulting benefits to the public, and the acceptance by the company, generally speaking, imposes upon it the obligation to operate, when constructed, the railroad it was incorporated to construct, and of doing so in the manner and for the purpose contemplated by its charter.—*State ex*

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*rel. Grinsfelder v. Street Ry. Co.*, 19 Wash. 518; *People ex rel. v. C. & A. R. R. Co.*, 130 Ill. 175; *Gates v. Boston R. R. Co.*, 53 Conn. 333; 33 Cyc. 635.

One of the obligations thus imposed, as we have said, is to so operate its trains as will reasonably serve the needs of the public. Applying these propositions to the case at bar, it follows, that plaintiff in error, by organizing for the purpose of purchasing the South Park system, and purchasing it, was granted and accepted a franchise for the benefit of the public, which obligated it to operate the road it purchased in such manner as to reasonably accommodate the public. At the time it purchased the South Park system it purchased other lines, as stated in a former part of this opinion. It operated, or heretofore has operated, all these lines as one system, under one general management and control. They are in no sense separate or independent. It appears, as previously stated, that the operation of its entire system has resulted in net returns aggregating large sums, for each of the six years previous to the date the action was instituted before the commission, and that during that period it has paid its stockholders, annually, large sums in the way of dividends. It has not surrendered its franchise, and continues in the enjoyment of all its corporate rights. It does not claim that the service ordered is more than sufficient to accommodate the traffic between Denver and Leadville. In such circumstances, the question of loss must be considered in connection with its duties and the productiveness of its corporate business as a whole. The law imposes upon it the duty of furnishing adequate facilities to the public on its entire system, not a part; and it cannot be excused from performing its full duty merely because, by ceasing to operate a part of its system, the net returns would be increased; so that it cannot be said, under the facts, that requiring plaintiff in error to perform its duty to the public by furnishing an adequate service over its line between Denver and Leadville, although a pecuniary loss is entailed, is unreasonable or deprives it of any constitutional

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right, either federal or state.—*Mo. Pac. Ry. Co. v. Kansas,* 216 U. S. 262; *Atl. Coast Line R. R. Co. v. N. C. Corp. Com.,* 206 U. S. 1; *Corporation Com. v. R. R.,* 137 N. C. 1.

In brief, under the facts of the case at bar, an order requiring a railroad company in the possession and enjoyment of its charter powers and privileges, to furnish a necessary service does not, even though a compliance with the order entails a loss, deprive it of its property without due process of law, or compel it to devote its property and revenues to a public use without just compensation, for the obvious reason that such an order merely requires it to discharge its legal obligations. Of course, that a service ordered will entail a loss is a circumstance to consider in determining the reasonableness of the order; but a common carrier cannot successfully complain that a loss will thus be occasioned when it appears that the ordered service requires nothing more than necessary transportation facilities.

In the *Missouri Pacific* case, *supra,* a writ of error was prosecuted to the judgment of the supreme court of Kansas, directing the railroad to obey an order of the railroad commission of that state, requiring the company to furnish an exclusive passenger service on one of its branches in lieu of a mixed train service. There, as here, the company attacked the validity of the order upon the ground that a compliance with it would result in a pecuniary loss in that the expense of furnishing an exclusive passenger train service would exceed the revenues derived from such service. The company contended that compelling it to suffer such loss invaded its constitutional rights. The supreme court held that so long as the company was in the possession and enjoyment of its charter powers, it was its duty to furnish adequate facilities for transporting passengers, and that requiring it to perform a service in this respect, which was not unreasonable, although such performance would entail a loss, did not deprive the railroad company of its property without due process of law, or result in the taking of its property for a public use without compen-

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sation, for the reason that such order was nothing more than requiring it to do that which it was essentially its duty to perform. In speaking to this point, the court quoted with approval from the *Atlantic Coast Line* case, *supra,* where it was said: "Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss, is an important criteria to be taken into view in determining the reasonableness of the order; but it is not the only one, as the duty to furnish necessary facilities is coterminous with the powers of the corporation. The obligation to discharge that duty must be considered in connection with the nature and productiveness of the corporate business as a whole, the character of the services required, and the public need for its performance." In considering further the duties imposed upon a railroad company to furnish adequate transportation facilities, the court, speaking through Mr. Justice White, said: "But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are, in the nature of things, paramount, since it cannot be said that the order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that it was binding in favor of the corporation as to all rights conferred upon it, and was devoid of obligation as to duties imposed, even although such duties were the absolute correlative of the rights conferred."

Counsel for plaintiff in error cite many authorities in support of their contention that the charter of the company is permissive, that the order of the commission impairs the obligation of contract and deprives the company of property without due process of law, which we do not deem it necessary to review, as, in our judgment, the cases cited, in connection with those cited from 116, 206 and 216 U. S., sustain our conclusion, that neither of these propositions is tenable.

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In our opinion, the law and the facts fully justify the order of the commission and the judgment of the district court, directing the company to obey it, and that judgment will, therefore, be affirmed. *Judgment affirmed.*

Decision *en banc.*

MR. JUSTICE HILL not participating.

Decided December 9, A. D. 1912. Rehearing denied January 6, A. D. 1913.

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[No. 6277.]

## BOARD OF COUNTY COMMISSIONERS OF THE CITY AND COUNTY OF DENVER v. MEYER.

1. CONSTITUTIONAL LAW—*Article XX*—Immediately upon the taking effect of article XX of the constitution, the official term of the superintendent of schools next theretofore elected for the old county of Arapahoe, terminated. No such office existed in the new entity, the city and county of Denver, and there could be no incumbent thereof. Having been chosen to the office of superintendent of schools for the city and county of Denver, at the first election under its charter, adopted pursuant to article XX, she was not entitled to receive, in such office, the salary prescribed by the general law, but only that fixed by the charter.

2. JUDGMENT—*When Res Judicata*—A judgment of the district court determined that plaintiff was the county superintendent of schools for the city and county of Denver and entitled to the salary prescribed by the general law. Subsequent to this she was chosen superintendent of schools for that territory, under the city charter, qualified under such election, and served for some months, accepting the salary prescribed by the charter. She then brought an action to recover the salary prescribed by the general law for this period, less the sum she had already received under the charter provision. *Held*, that the former judgment was not *res judicata* of the questions presented in her new action, as an entirely different state of facts was involved, presenting different parties, different subject matter and new issues.

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*Error to Denver District Court.*—Hon. GEORGE W. ALLEN, Judge.

Mr. FRED W. PARKS, for plaintiffs in error.

Messrs. YEAMAN & GOVE, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

This is an action in mandamus to compel defendants, as a board of county commissioners, to audit and allow, and cause to be issued and delivered to plaintiff, a warrant for a balance alleged to be due for salary, under the state law, as county superintendent of schools of the city and county of Denver. To a judgment making the writ final, defendants bring error.

The facts are not in dispute. The record shows that at the general election in November, 1901, plaintiff was chosen to the office of superintendent of schools for Arapahoe county, and that she qualified and entered upon the duties of her office in January next thereafter. Under the provisions of the constitution as it then stood, her term of office was for two years, and would have expired in January, 1904. At the general election in November, 1902, article XX of the constitution was adopted, and became effective the following December by proclamation of the governor. On March 29th, 1904, pursuant to the provisions of article XX, the city and county of Denver adopted a charter, which, among other things, designated the office of county superintendent of schools of the city and county of Denver, with a salary of $900.00 per annum. In May, 1904, at a general city and county election, plaintiff was elected under the charter to, and on June 1st following qualified for, that office, and served and received the salary, as provided for by the charter, for seven and one-half months, the period involved in this action. The plaintiff now claims that for this period she was entitled to compensation at the rate of $2,800.00 a year, under the state law, or $1,711.68,

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less the sum of $550.00, which she had received as salary under the charter, leaving a balance due of $1,161.08.

This question has been, by this court, frequently determined contrary to the contention of plaintiff. Her term of office as county superintendent of schools for Arapahoe county was expressly terminated by article XX on December 1, 1902, when it went into effect. She never was county superintendent of schools, under the general laws, for the new entity, "The City and County of Denver." No such county office ever has existed in that territory, and naturally there could not have been an occupant of that office. Plaintiff was, at the May election in 1904, under the charter, chosen to the office of county superintendent of schools for the city and county of Denver. As such officer it became and was her duty, in addition to discharging the duties of superintendent of schools, under the charter, to also discharge, for the same salary, the duties therein which devolve upon county superintendents of schools generally under the state laws. During this period the only salary plaintiff was entitled to have was that provided by the charter. This she has already received. On no theory is she entitled to get more. The following authorities are conclusive upon the foregoing propositions: *McMurray v. Wright*, 19 Colo. App. 17; *Uzzell v. Anderson et al.*, 38 Colo. 32; *Orahood v. City and County of Denver*, 41 Colo. 172; *Aichele v. City and County of Denver*, 120 Pac. (Colo.) 149; *People ex rel. v. Cassiday et al.*, 50 Colo. 503; *Dixon v. People ex rel.*, decided October 25, 1912; and *Elder v. City and County of Denver*, decided November 11, 1912.

It is urged that whether plaintiff was county superintendent of schools, as claimed in this suit, has been determined in her favor in an action in the district court of the city and county of Denver, brought by her against William A. Hoover et al., the executive officers of the city and county of Denver, to compel them, and in which they were adjudged, to draw and certify salary warrants in favor of the plaintiff, as such officer, for the six months' period immediately prior to that

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involved in this suit. That judgment is in direct conflict with numerous decisions of this court, some of which are cited above, notably the *Cassiday,* the *Elder* and the *Anderson* cases, wherein the precise questions upon which plaintiff here relies to support a recovery, although between different parties and affecting the status of different county officers, were determined contrary to the conclusion reached in the *Hoover* case. Under such circumstances, it may well be doubted whether this court would be bound by a decision of a *nisi prius* court, on a question of *res judicata,* even if all the elements were there present to make such decision applicable here on that theory.

This record, however, shows that after the *Hoover* decision plaintiff was elected county superintendent of schools for the city and county of Denver under the charter, qualified and acted as such during the full period covered in this controversy. When she was so elected and qualified, then by charter designation she became the officer or agent to discharge in that territory, if it was intended by article XX that there should ever be such an officer therein, all duties appertaining to that office, under the general law. Whatever difference of opinion there may be as to whether plaintiff was, prior to her election under the charter, county superintendent of schools in that territory under the state law, after the adoption of article XX, either *de jure* or *de facto,* clearly after such election and qualification she was only an officer therein under the charter. So that, in this suit, in addition to having different parties, different subject-matter, and different issues from those in the *Hoover* case, a thing has intervened, to-wit, the election of plaintiff as county superintendent of schools under the charter, which changes the entire situation, and therefore, in no event, can the decision in the *Hoover* case be held to be *res judicata* of the questions at issue in this case.

It failing to appear from the case as made by plaintiff that there was any duty upon the defendants to audit, allow or draw warrants for her claim, the judgment so directing

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was wrong and is reversed, and the cause remanded with directions to dismiss the complaint.

MR. JUSTICE MUSSER and MR. JUSTICE WHITE concur.

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[No. 6480.]

## BURNS v. REPUBLICAN PUBLISHING CO.

LIBEL—*Charge of Bribery*—To falsely publish of another anything tending to bring him into odium is libelous *per se*, *e. g.*, that the person mentioned had been guilty of corrupting a jury, in a cause pending in another state, and this, whether the act was or was not a criminal offense, by the law of such other state.

*Error to Denver District Court.*—Hon. GEORGE W. ALLEN, Judge.

Messrs. THOMAS, BRYANT & MALBURN, for plaintiff in error.

Messrs. WARD & WARD, for defendant in error.

MR. JUSTICE GABBERT delivered the opinion of the court:

Plaintiff in error brought an action against defendant in error to recover damages for an alleged libel. To his complaint defendant interposed a motion to strike certain paragraphs, which was sustained. To the complaint as it then stood, the defendant interposed a general demurrer, which was, also, sustained. Plaintiff elected to stand by his complaint, and his action was dismissed.

The sole question to determine is the sufficiency of the complaint, when tested by the general demurrer, as it stood after the motion to strike was sustained. It alleged, in substance, (after stating that defendant owns and publishes, in the city of Denver, a daily newspaper known as "The Denver Republican," and that an action at law had been instituted by James Doyle against him in the district court, at Council Bluffs, Iowa,) that a trial before a jury resulted in a verdict

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in favor of this plaintiff, Burns, and that later Doyle filed a motion for a new trial, based upon various and divers grounds, which motion was sustained. It then alleged:

"That on, to-wit, the 17th day of October, A. D. 1907, the said defendant did print and publish in its said paper, the Denver Republican aforesaid, and did circulate and cause to be circulated therein and thereby, the following false and defamatory statement with reference to the said case and said motion for a new trial of and concerning this plaintiff, to-wit: 'Burns (meaning this plaintiff) fought the case (meaning the said case of Doyle against this plaintiff in said Pottawatamie county, Iowa), and a third trial was ordered, in which Burns (meaning this plaintiff) was entirely successful; but in April, 1905, Doyle procured evidence that Burn s(meaning this plaintiff) had bribed the jury in the last case (meaning the jury in the last trial of said case), and his proof was so strong that Judge Greenwald set aside the verdict (meaning the said verdict in favor of this plaintiff in said case) in favor of Burns (meaning thereby that the said verdict was set aside on account of bribery of the jury by this plaintiff)'."

The complaint also alleged "that in truth and in fact the said motion for a new trial was expressly overruled, denied and refused by the said judge, as to each and every charge and statement therein contained, charging this plaintiff with such bribery, and was sustained for entirely different and distinct grounds and reasons therefor." Special damages were not claimed.

The statement quoted in effect charges that plaintiff was found guilty of bribery, when, in fact, according to other averments of the complaint, this statement was not true. The complaint avers that it is false, nor can it be said the statement is a mere narration of what occurred in the Iowa court, for the complaint further avers that in truth and in fact the motion for a new trial upon the grounds of the alleged bribery was denied, and expressly overruled.

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On behalf of defendant it is contended that the language of the statement is not actionable *per se,* for the reason it is not charged that bribing a jury is an offense in Iowa. We do not deem it necessary to go into this question. A false writing published of another of a character which manifestly tends to charge him with the commission of an act which will make him the subject of odium is libelous *per se. Republican Publishing Co. v. Mosman,* 15 Colo. 397. The demurrer should have been overruled.

The judgment of the district court is reversed and the cause remanded, with directions to overrule the demurrer.

*Reversed and Remanded.*

Decision *en banc.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE MUSSER not participating.

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[No. 7422.]

## MITSUNAGA V. THE PEOPLE.

1. JURORS—*Open Venire*—Under the statute the court may order a jury drawn from the box or summoned by an open venire. Unless prohibited by statute this power is inherent in the courts at common law.

2. CRIMINAL LAW—*Practice—Opening Statement of Prosecutor*—A narration by the prosecutor, in his opening statement, of the details of an alleged confession of the prisoner is harmless, where the confession is afterwards held competent and admitted. But it seems the better practice merely to refer to the confession, without going into details.

3. ——*Instructions Must Be Based Upon the Evidence*—In the trial of one accused of willful murder an instruction upon the law of manslaughter is properly refused where there is no evidence upon which a conviction of that degree of homicide can be rested.

4. ——*Interest of Party Testifying in His Own Behalf*—Where in the trial of an indictment the jury are told, by an instruction applying to all the witnesses, that in determining the weight to be given to their testimony they should take into consideration the motive any

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witness may have to testify falsely, it is not error to say to the jury, in another part of the charge, that the accused is subject to the same test as other witnesses, and that they should take into consideration his interest in the result of the trial.

5. EVIDENCE—*Cross-examination*—It is not admissible to interrogate a witness on cross-examination as to matters not germane to his testimony in chief, and having no reference to statements attributed to him at variance with his testimony.

6. ——*Discrediting Witness—Prior Statements*, of a witness about matters upon which he has not given testimony are not to be shown; nor statements touching collateral irrelevant, or immaterial matters, which have no tendency to affect his credibility or test his recollection.

7. ——*Confessions—Privileged*—A statement made by an accused person to an officer, in the presence and through the aid of a clergyman, is not to be excluded on suggestion of the ecclesiastical character of such clergyman, where it does not appear that the clergyman was the spiritual adviser of the accused, or even that they were of the same sect, or denomination.

8. ——*Prosecution Not Bound by*—The prosecution are not bound by the statements made by the prisoner, even though produced in chief against him, and though they are not contradicted. It is for the jury to say how far the statement is to be accepted.

9. WRIT OF ERROR—*Harmless Error*—To admit evidence of a confession or statement of the accused is not injurious, where testifying on his own behalf, he makes substantially the same statement.

So where, the prisoner being charged with murder, his counsel called upon the prosecutor to produce certain clothing of defendant, in order to show that it bore no blood-stains. It did not appear that the prisoner wore the clothes in question while at the scene of the homicide, and the chief of police, to whom they had been delivered, testified that they showed no blood-stains. *Held*, that the failure to require their production was harmless.

*Error to Denver District Court.*—Hon. HUBERT L. SHATTUCK, Judge.

Mr. O. N. HILTON, Mr. B. B. LASKA and Mr. CAESAR A. ROBERTS, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, Mr. PHILIP W. MOTHERSILL, assistant attorney general, for the people.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. Friday, May 6, 1910, Catherine Wilson moved into No. 1054 Clayton street, Denver. The family consisted of herself and husband; but she was alone at the time, he being at Hot Springs, Arkansas. That night, she stayed with her daughter, Mrs. Galland, and Saturday, returned to the house, where she employed the defendant to clean the windows and bath tub, in the afternoon. Saturday afternoon, she met Hazel Miller, whom she invited to stay with her that night, and as far as disclosed by any of the evidence—other than the account given by the defendant—this is the last that was seen or heard of her, until her body was found Monday afternoon. Miss Miller on arriving at the house Saturday evening to keep her engagement, found the house locked. She went in by raising a back window; but found no one there, and after waiting for Mrs. Wilson an hour or more, left about 8:30. Sunday, May 8, Mr. Wilson, who was on his way to Denver from Hot Springs, telegraphed his wife, in care of Mrs. Galland, that he would arrive in Denver about 12:15 Monday noon. Late in the afternoon, Mr. Galland took this message to 1054 Clayton street, and finding the house locked, and no one at home, left it sticking in the door. Miss Miller told Mrs. Galland of her experience at the Wilson house Saturday night, and Mrs. Galland, still unable to learn of the whereabouts of her mother, met Mr. Wilson at the station, and told him she was missing They went to the house that afternoon, finding it still locked, and upon searching the premises, found the body in the cellar, crowded into a box, covered with excelsior, straw, and another box. A strip of muslin cloth was drawn tightly about the throat, indicating strangulation. There were bruises and cuts on the head and chest, and blood stains in the kitchen and on the stairs leading to the cellar, an attempt having been made to obliterate these by wiping them up with rags, left in the sink. Her "rat" had been crowded into her throat, and a

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three-pound Indian club stained with blood, was found behind the retaining wall in the cellar.

Deceased was a large, robust woman weighing about 160 pounds. The defendant was a small Japanese, about 120 pounds in weight, but physically strong and active, except that his left arm had been injured ten years before. He worked for a Broadway cleaning establishment, operated by a Japanese, who took orders, and filled them by sending others to do the work, collecting a percentage on what they received, as commission.

On this Saturday morning, defendant was sent to clean carpets on York street, and while there, was directed by phone from the establishment, to go to 1054 Clayton, to work in the afternoon, which he did, arriving there about 1:30, and going to work at once. He left about 5:30, before finishing, going to the cleaning house, where he ate his supper, changed his clothes, went down town, returned, and erased his name from a book which gave the information that he had been sent to 1054 Clayton. That night he went to McCook, Nebraska, changed his name, and in a couple of days, went to work as a section hand. Later he was arrested there, brought to Denver, and placed in jail. While confined, he made two separate statements to the authorities regarding the transaction, which were reduced to writing, and on the trial, were read to the jury as part of the people's case in chief. In the first statement, he said he had not worked at all, at 1054 Clayton, that he went there; but that the lady who came to the door, told him she wanted a Jap to come in the morning, and not in the afternoon, so he returned to the cleaning establishment. In the second statement, he said he worked at 1054 Clayton, cleaning the windows in the afternoon, and assisted a man in putting the dead body of Mrs. Wilson in the box. In the first statement, he said he went on the train with 12 Jap boys to McCook. In the second, he said he did not know whether they were on the train; that he met them after he arrived there. In the first statement, he said he borrowed the money

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to buy a ticket to McCook; in the second statement he said he bought it with money given him by the man he assisted. On the trial, he said that he was sent by the cleaning establishment to 1054 Clayton, where he made an agreement with the lady to clean her windows and bath tub, and went to work at once; that he cleaned the windows first, and then went to the bath room, the lady being about the house, and occasionally conversing with him; that while he was working in the bath room, a tall stranger came in, his face scratched and bleeding, and his shirt covered with blood, who, with a revolver in his right hand, seized defendant with his left, and forced him to go to the cellar, where, at the bottom of the stairs, lay the dead body of the lady; that the man's left arm was injured, and he put a cloth around her neck, stood on one end of it and pulled the other end with his right hand until it was tight, then at the point of his revolver, he forced defendant to assist him in putting the body in the box; that the stranger, still threatening him with his revolver, forced him to take rags and wipe up the blood stains, after which, he took him to the front door, gave him $30.00, and pushed him out. Going to the cleaning establishment, he changed his clothes, ate supper, and went down town, where he met a fellow countryman, to whom he related the occurrence, and being informed that it was a serious matter, he became frightened, went back and erased his name from the book showing his presence at 1054 Clayton, not on account of the transaction; but to escape the payment of a commission; then went down town again and tried to secure a railroad pass to accompany a number of Japanese boys who were going to McCook, Nebraska, to work on the section; but failing in this, he bought a ticket with a portion of the money the man had given him, and left that night.

The defense is, that the murder was committed by the stranger who compelled defendant to assist him in putting the body in the box, and wipe up the blood stains; and an attempt is made to cast suspicion upon Mr. Wilson. There is no evidence in the whole record even suggesting the husband had

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anything to do with the crime. No objection is made here that the evidence is not sufficient to support the verdict. The errors assigned are: 1. Challenge to the array; 2. Election between counts; 3. Remarks of the district attorney in opening the case; 4. Refusal to allow certain cross-examination; 5. Admission of defendant's statements; 6. Failure of the chief of police to produce certain clothes. Such of these assignments as have not been abandoned, will be considered.

2. Defendant challenged the array because the jurors were selected upon an open venire, and not drawn, at a time when there were in the box the names of 500 competent jurors. There is nothing in this contention. The statute provides that the court may order a jury drawn from the box, or summoned by an open venire. Whenever the court needs more jurors, it has the power, under the statute, to either draw them from the box or summon them by an open venire. Aside from this, we have held that the statutory method of summoning jurors is not exclusive, and unless prohibited, the court has the inherent common law power to select a jury upon an open venire, directed to the sheriff.—*Mackey v. People,* 2 Colo. 13; *Giano v. People,* 30 Colo. 26; *Imboden v. People,* 40 Colo. 142; *Walt v. People,* 46 Colo. 138.

3. It is next complained that the district attorney in his opening statement, told the jury that the defendant had confessed, and narrated the purported confessions—being the two statements afterwards admitted in evidence—to the jury. It is contended the court should not have allowed the prosecution to do this, because the admissibility of the evidence had not been determined, and if excluded, the rights of the defendant might be jeopardized. It probably would be the better practice, ordinarily, for the prosecution in opening, merely to refer to such matters, without going into details; because at the trial, the offered evidence might be excluded. In this case, however, no harm was done the defendant, because the statements were afterwards held competent, and admitted in evidence.

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4. Deceased's husband, Ridgley Wilson, testified about starting to Denver from Hot Springs, and telegraphing his wife from Kansas City that he had missed connections, and would not reach Denver until 12:15 Monday noon; of Mrs. Galland meeting him at the station and telling him of the disappearance of his wife; of their going to the house in the afternoon and finding the body in the cellar. This, in substance, was his testimony. On cross-eyamination he was asked: Did your wife tell you, just before you left Denver, that she had told Mrs. Faxon, that she desired to change her insurance policy, so as to make her daughter beneficiary instead of yourself; that she expected something would happen to her, and that if she was killed, it would be you who did it, to look for her and she would be found? Did you ever pursue her with a revolver, about the house? You had frequent quarrels with your wife, while you were married and living with her? Did you tell her in a letter, that when she found a house, you wanted her to get one in a locality where you were not known? Did you tell Mabel Galland, you wanted her to keep it, (the identification slip given him by the porter on the Pullman) that somebody might say you had come into Denver on a mule? The objections to these questions were sustained, because they were not proper on cross-examination. It is claimed in argument, they were asked for the purpose of impeaching the witness. It is evident they were not germain to any matter about which the witness had testified, and therefore, not proper cross-examination; neither were they proper impeaching questions. If a witness has made previous statements out of court, upon a matter material to the issue, substantially different from his evidence in court, such statements may tend to impeach his recollection or his truthfulness, and should be considered by the jury in determining the credibility of the witness, and the weight to be given to his testimony.—*Rose v. Otis,* 18 Colo. 59; *Mullen v. McKim,* 22 Colo. 468; *Jaynes v. People,* 44 Colo. 541; *Ryan v. People,* 21 Colo. 119; *Nutter v. O'Donnell,* 6 Colo. 253.

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But prior statements of a witness about matters upon which he has not testified in court, cannot be shown. There must be a material inconsistency or contradiction between his evidence in court, and his alleged previous statements out of court, and the impeaching question must not be upon collateral, irrelevant or immaterial matters; but must be upon matters material to the issue. The test as to its materiality is said to be: If the statement which it is alleged the witness made out of court, was true, would the impeaching party be entitled to prove it in support of his case?—*Askew v. People,* 23 Colo. 455; 40 Cyc. 2700.

These questions did not tend to affect the credibility, or test the recollection of the witness upon any material evidence he had given, and if he had answered in the negative, defendant would not, on that account, have been allowed to prove the contrary.

5. While in jail, defendant was visited by Shirato, a Japanese Methodist minister, who reported to the chief of police, that defendant wished to see him. He was taken to the chief, and made the first statement. Later, he again sent word by Shirato that he wanted to see the chief, to whom he made the second statement. It is claimed these statements were privileged communications, because made to Shirato as his spiritual adviser. There is no evidence that defendant was a Methodist, or that Shirato was his spiritual adviser. Defendant voluntarily sent his wish by Shirato to see the chief, and then made the statements to him. He was well represented by interpreters, and precaution was taken to remind him of the seriousness of the offense, and that his statement must be voluntary. No violence, threats, inducements, promises or hope of any kind were held out to him to induce him to make these statements, and there was no error in admitting them in evidence.—*Reagan v. People,* 49 Colo. 316; *Byram v. People,* 49 Colo. 533. The defendant afterwards testified in his own behalf in practically the identical language of his second state-

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ment, so we do not see how he could have been harmed by its introduction in evidence by the people.

6. It will be remembered the defendant, after he left Clayton street, went to the cleaning establishment, ate his supper, changed his clothes, and went down town. Afterwards, the proprietor of the place, delivered some clothes to the chief of police, which were said to belong to defendant, and on the trial the officer was subpoenaed *duces tecum,* by the defendant, to produce these articles; the purpose being to show the jury they contained no blood stains. This the chief said he could not do, because they had disappeared, and this is assigned as error. There is no evidence that these clothes were worn by the defendant while at the Wilson house; and as the chief testified the clothes brought to him showed no signs of any blood stains, their non-production could make no difference to the defendant.

7. Error is assigned upon the refusal of the court to instruct upon manslaughter. The deceased was murdered. Over this, there was no controversy. Who committed the murder, was the only question. There was no occasion for instructing on manslaughter, because there was no evidence upon which to base such a verdict.—*Smith v. People,* 1 Colo. 144; *Crawford v. People,* 12 Colo. 292; *Kelly v. People,* 17 Colo. 137; *Carpenter v. People,* 31 Colo. 290; *Mow v. People,* 31 Colo. 360; *Van Wyk v. People,* 45 Colo. 12-18; *Reagan v. People,* 49 Colo. 326.

8. In instruction 16, the court told the jury they were the judges of the credibility of all the witnesses and the weight to be given their testimony; in determining which, they should take into consideration the motive or interest any witness might have in testifying falsely. In instruction 17, they were told that defendant was subject to the same test as other witnesses, and they should take into consideration his interest in the result of the trial. Error is assigned upon the latter instruction, because it singles out the defendant, and directs special attention to his credibility. The court had previously

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told the jury in instruction 16, that they were the judges of the credibility of all the witnesses, and should take into consideration the interest any witness had in the trial. This included the defendant as a witness, and the court might properly have stopped there; but perhaps some juryman might not have comprehended that this included him, that is, might have considered him in some different or other capacity; therefore, it was not prejudicial error for the court to tell the jury in another instruction, that the defendant was a witness, and they had no right to disregard his testimony merely because he was the defendant; but must consider it, and give it such weight as they thought proper, in connection with all the other evidence in the case, and in determining the weight and credibility of his evidence, they had a right to take into consideration the fact that he was the defendant, and his interest in the result of the trial. We know there are authorities holding it is reversible error to single out the defendant in this manner; but we fail to see how such an instruction can so prejudice the rights of the defendant as to make it reversible error, and this court is committed to its propriety.—*Minich v. People,* 8 Colo. 440-453; *Babcock v. People,* 13 Colo. 515-523; *Porter v. People,* 31 Colo. 508-515.

9. Counsel for defendant contend the people were bound by his statements which the prosecution introduced in evidence in chief, unless they were shown to be untrue. It was for the jury to determine from all the evidence in the case, how much, if any of the statements they would believe.—*State v. Merkle,* 189 Mo. 315-321.

*Affirmed.*

Mr. JUSTICE WHITE and Mr. JUSTICE MUSSER concur.

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[No. 7426.]

## TOWN OF LYONS v. CITY OF LONGMONT.

1. CONSTITUTIONAL LAW—*When the Constitution Is Self-Executing*—Constitutional provisions are self-executing when it appears from the context that they are intended to operate at once, without the aid of legislation to give effect to the right conferred, or enforce the duty prescribed.

Section 7, art. XVI of our constitution is of this character. It does not merely declare principles, but confers a right and prescribes the conditions and rules under and by means of which that right may be enforced.

2. ——*Construction of the Constitution*—The purpose of a constitutional provision is to be ascertained from the words thereof. The title or caption of the article in which it is found is not controlling.

3. ——*Section 7 of art. XVI*, confers on all persons and corporations the right of way across any lands, public or private, for conveying water for domestic purposes. The character of the conduit is unimportant. A municipal corporation may condemn a way through and across the public streets and alleys of another municipality for the construction of a pipe-line for conveying water for the domestic uses of its inhabitants.

The latter municipality still retains authority to prescribe necessary reasonable regulations which must be observed by the former in maintaining and operating such pipe-line.

*Error to Boulder District Court.*—Hon. JAMES E. GARRIGUES, Judge.

Messrs. SCHUYLER & SCHUYLER and Mr. HENRY TROWBRIDGE, for plaintiff in error.

Mr. GRANT E. HALDERMAN and Mr. HORACE N. HAWKINS, for defendant in error.

The town of Lyons and the city of Longmont are located on the St. Vrain, the former near the point where the stream emerges from the foot-hills, and the latter about nine miles below. The city of Longmont commenced an action against the town of Lyons and a number of private owners of property in the town to condemn a right of way for a pipeline to carry water for domestic and other uses and purposes, for the in-

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habitants of the city, through, and under certain streets and alleys of the town, and also through certain parcels of land owned by the individual property owners. The water supply for this system is taken from the north fork to the St. Vrain some distance above the town of Lyons. It is not necessary to notice in detail the averments of the petition filed by the city, as its sufficiency is not challenged, if the city has the right to condemn a right of way for its pipeline through the streets of the town of Lyons. To the petition the respondents filed their joint and several demurrers on the ground that the court was without jurisdiction of the proceedings, or to grant possession of the premises described in the petition, and, generally, that the petition did not state facts sufficient to constitute a cause of action. This demurrer was overruled. The city then applied for an order granting it possession of the premises described in its petition, to enable it to proceed with the construction of its pipeline, which was granted. Thereafter, for the purpose of saving time and expense to the parties, and in order to hasten the disposition of the case, a stipulation of facts was entered into between the parties, by which it was agreed that an answer need not be filed by respondents, and that the case should be considered at issue, without any further plea; that a board of commissioners need not be appointed, nor jury summoned; that the findings of the court should be as valid and effective as if a board of commissioners had been appointed and returned their report, and appraisement; that the value of the land or property actually taken was one dollar for each tract or parcel; that there were no damages to the residue; and no benefits to any of the land of respondents not taken. It was further stipulated that the route described in the petition through the town of Lyons from petitioner's intake dam is the most practicable, feasible, and least expensive route, and that if a line was constructed which did not pass through the town of Lyons it would involve a greatly increased cost, and engineering questions of getting the line over hills and cliffs, which are not involved in

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the line going through the town of Lyons; that the town of Lyons lies between the diversion, or intake dam of the city of Longmont, and the corporate limits of the latter, and that the pipeline did not pass through cultivated or improved land in the town of Lyons, and that no building or improvement was interfered with or damaged. It was also stipulated, as alleged in the petition, that the line was to be a "flow line,"—that is, a pipeline in which the water flowed by gravity, and not by pressure, and that the line through Lyons should be, and was, a concrete and steel pipe, laid several feet below the surface, with every joint cemented or leaded, and fitted so closely together that water would, or could, not leak from the line; and that the city, as stated in its petition, only sought to obtain the right of way through the town of Lyons for the purpose of conducting water through its pipeline, subject to all reasonable rules and regulations, which then existed or might thereafter be enacted by the town with respect to the laying and maintenance of the line within its boundaries.

The line had been laid through the town before the cause was tried. At the trial it appeared without dispute that the pipe had been laid through the town of Lyons at a depth of from four to ten feet; that no improvements of the town had been interfered with; that the water line of the town of Lyons had been crossed twice, Longmont's pipe going underneath; and that the pipe had been laid through the town with extra care and expense, so as to make it absolutely safe, the line having been surrounded with concrete, so that it would never break, no matter how heavy the travel over the streets might be. It appears from the stipulation of the parties and the testimony, that the use of the streets by the town of Lyons through which the pipeline passes is not in any manner interfered with.

On these facts the court entered judgment awarding the city of Longmont a right of way over, upon, and through the parcels of land and streets mentioned in its petition, for its pipeline, for the conveyance of water to its water works system; and that upon payment of the damages, as fixed by the

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stipulation of the parties, the city of Longmont should become seized in fee of the right of way through such streets and parcels of land. The town of Lyons brings the case here for review on error, and contends the judgment is erroneous for the following reasons:

"1. The streets and alleys of the town of Lyons are public property and no right exists, and the courts of this state have no jurisdiction, to condemn a right of way for a water pipe line by one municipality through the streets and alleys of another municipality.

2. The statutes of Colorado specifically prohibit the laying of any pipeline in any street or alley of a town or city without the consent of such town or city.

3. Towns and cities of this state have exclusive jurisdictum over the use of their own streets, and the judgment of the district court herein deprives the town of Lyons of such jurisdiction, and also results in giving jurisdiction to two municipalities over a portion of the streets and alleys of one of said municipalities, at the same time, and for the same purpose."

In support of this proposition, the following statutory provisions of the Revised Statutes of 1908 are relied upon: Section 6519; sub-divisions 58, 67, 68, 70 and 74, and paragraphs 1, 4, 7, 8, 9, of sub-division 7 of section 6525; section 6815; the Eminent Domain Act, sections 2415, 2416, 2458 *et seq;* and sections 6676 and 6588.

Based on these provisions, and the facts, the argument of counsel for the plaintiff in error is, that the streets and alleys of the town of Lyons are public property; that the constitution and statutes of the state only confer the right to condemn private property; that a pipeline can not be laid in any street or alley of a town without its consent; that towns and cities have exclusive jurisdiction over the use of their streets; that the judgment confers jurisdiction on two municipalities over the same streets and deprives the town of Lyons of the use of its streets for water, gas, sewer, pipeline and other municipal uses.

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The contention of counsel for the city of Longmont is, that the Eminent Domain Act gives the city a right to condemn a right of way through the streets of the town of Lyons, or, if it does not, that this right is conferred by section 7 of article XVI of the constitution, which is as follows:

"All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation."

For a reply to this argument, counsel for plaintiff in error contend that the section is not applicable, for the reason that it is part of an article confined to the subject of "Mining and Irrigation," and was not intended for a municipal water supply; that it only applies to "ditches, canals and flumes," and does not apply to a "pipeline" for carrying water underneath the surface; that the streets and alleys of the town of Lyons are not "public lands" within the meaning of this provision, and that it is not self-executing.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The sole question involved is, whether the city of Longmont has the right to condemn a right of way for its pipeline through the streets and alleys of the town of Lyons. Independent of statutory provisions cited by counsel for plaintiff in error, we think this right is conferred by the constitutional provision above quoted. It declares that all persons and corporations shall have the right of way across public, private and corporate lands, for the purpose of conveying water for domestic purposes. The intent of a constitutional provision is the law. Manifestly, the intent of the provision under consideration was to confer upon all persons and corporations the right of way across lands, either public or private, by whomsoever owned, through which to carry water for domestic purposes, and necessarily, embraces a municipal corporation seeking a right of way for such purposes. It covers every

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form in which water is used, domestic, irrigation, mining and manufacturing, and its object is to be ascertained from its language and not from the title or heading the compiler of the constitution has given the article in which it is found. If does not mention a pipeline, but its evident object was to permit a right of way for a conduit through which to convey water for the purposes designated, and hence, the kind of conduit employed and utilized is of no material moment, so far as any question in the case at bar is involved. It does not merely declare principles. On the contrary, it is complete in itself, and by its own terms, confers a right and prescribes the rules and conditions by means of which such right may be enforced. It employes no language to indicate that the subject with which it deals is to be referred to the legislature for action. A constitutional provision is a higher form of statutory law, which the people may provide shall be self-executing, the object being to put it beyond the power of the legislature to render it nugatory by refusing to pass laws to carry it into effect. Constitutional provisions are self-executing when it appears that that they shall take immediate effect, and ancillary legislation is not necessary to the enjoyment of the right thus given, or the enforcement of the duty this imposed. In short, if a constitutional provision is complete in itself, it executes itself.—*Davis v. Burke,* 179 U. S. 399; Cooley on Const. Lim., 6th Ed., 99; 6 Am. & Eng. Ency., 912; *Kitchin v. Wood,* 70 S. E. (N. C.) 995; *Willis v. Mabon,* 48 Minn. 140.

To summarize: The constitutional provision under consideration confers a right and prescribes the rule by means of which, in an appropriate action in a court of competent jurisdiction, that right may be enforced without further legislation, and is, therefore, self-executing.

In so far as the statutory provisions cited by counsel for plaintiff in error are in any sense applicable, the rights thereby conferred upon cities and towns are subject to this constitutional provision. The judgment in no sense deprives the town of Lyons of jurisdiction over its streets and alleys, as it re-

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tains authority to prescribe all reasonable and necessary rules and regulations, which the city of Longmont must observe in maintaining its pipeline through such streets and alleys, and all rights which it may exercise over its line within the corporate limits of Lyons are, therefore, subject to such control. It affirmatively appears that the judgment of the district court does not deprive the town of Lyons of the use of its streets for any purpose whatever, either present or future, and it is, therefore, unnecessary to consider whether a right of way for the purposes mentioned in the constitution would be granted when the effect would be to deprive a municipality of all use of its streets through which such right of way was sought.

The judgment of the district court is affirmed.

*Judgment affirmed.*

Decision *en banc.*

CHIEF JUSTICE CAMPBELL and Mr. JUSTICE GARRIGUES not participating.

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[No. 7535.]

## GALLIGAN V. LUTHER.

1. PLEADINGS—*Amendment*—An amended complaint is not to be filed without leave of the court.

A judgment rendered after a trial had without notice to the defendant, upon an amended complaint filed without leave, and increasing the plaintiff's damages, should be vacated on motion.

2. NEW TRIAL—*Verdict Not Conforming to the Evidence*—A verdict must be supported by the evidence, and consistent with some legitimate theory of what the testimony tends to establish. If wholly at variance with the testimony and the theory upon which the cause was tried, it should be vacated.

*Error to Pueblo District Court.*—Hon. C. S. ESSEX, Judge.

Mr. M. J. GALLIGAN, plaintiff in error, *prose.*

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Messrs. McCORKLE & McCORKLE, for defendant in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Plaintiff in error commenced an action against the defendant in error to recover the sum of three hundred and fifty dollars, claimed as the balance due for services as an attorney in the sum of five hundred dollars, and fifty dollars advanced at the defendant's request. After the issues were made, plaintiff, without leave of court, or application for that purpose, filed an amended complaint, in which he claimed that the services rendered were worth the sum of one thousand dollars, and prayed judgment for eight hundred and fifty dollars. A copy of this amendment was served upon counsel for defendant. A few days after service of the amendment, plaintiff, without notice to defendant, or rule upon him to plead to the amended complaint, had the cause set for trial. Pursuant to this order, and without any further proceedings or knowledge on the part of defendant, plaintiff tried the cause before a jury, and obtained a verdict for eight hundred and fifty dollars, upon which judgment was rendered. Shortly after defendant moved to set aside the verdict and judgment upon the ground, among others, that the cause was not at issue, when tried. This motion was sustained. Thereafter, the defendant filed an amended answer to the amended complaint, and the cause was tried before a jury, and a verdict rendered for fifty dollars, upon which judgment was entered. The plaintiff brings the case here for review.

The first point urged is, that the court erred in setting aside the judgment. Without leave of court the plaintiff was without right to file an amended complaint. After the amended complaint was filed, increasing the claim for services from five hundred to one thousand dollars, the cause was tried without notice to defendant, and in his absence, and without an amended answer or rule to file one. We think the court ruled correctly in setting aside the judgment.

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The defense was to the effect that plaintiff had agreed to render the services to recover the value of which the action was brought for the sum of two hundred and sixty dollars, upon which defendant had paid two hundred and forty-six dollars. The testimony on the part of defendant tended to support this contention. It was also claimed on his part that plaintiff had not complied with his agreement, and for that reason he had been compelled to employ other counsel. There was no testimony as to what sum he had paid on this account, or what the services of other counsel were reasonably worth.

The claim of plaintiff was, that there was no express agreement, but that he was to be paid the reasonable value of the services rendered. The testimony on his behalf was that they were worth the sum claimed. There was no evidence to the contrary. Plaintiff testified that only two hundred dollars had been paid. The verdict rendered was wholly at variance with the testimony, and the theory upon which it was tried and submitted to the jury by the respective parties. A verdict must be consistent with the testimony and the facts which it purports to determine. It must be consistent with some legitimate theory of the testimony or what the testimony tends to prove; and when it is not warranted by any legitimate analysis of the evidence or what may be fairly inferred therefrom, it should be set aside.—*Burns-Moore M. & T. Co. v. Watson,* 45 Colo. 91.

According to the testimony on behalf of plaintiff, he was entitled to recover practically the sum claimed in his complaint. According to the testimony of the defendant, he had paid plaintiff two hundred and ten dollars on account of services rendered under his special contract with plaintiff, and thirty-six dollars for court costs, while plaintiff testified that nothing had been paid on account of the latter item, although for this purpose he had advanced fifty dollars. That this sum had been advanced was not denied by defendant, so that, according to the testimony, bearing on the subject of the amount advanced for costs, he would owe plaintiff the sum of fourteen

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dollars, and, from the testimony of the defendant as to the balance of the contract, the sum of fifty dollars, leaving the amount due plaintiff the sum of sixty-four dollars; or, if we accept the testimony of plaintiff that nothing had been paid for court costs, then defendant would owe him fifty dollars on this account, and if the contract was established, the defendant would owe him sixty dollars more, making a total of one hundred and ten dollars. Counsel for defendant seek to avoid this situation by claiming the jury believed that plaintiff had agreed to render the services involved for two hundred and sixty dollars; that he had received two hundred and forty-six; and that as he had not tried some of the cases, and therefore had not complied with his contract, which necessitated the employment of other counsel, the fifty dollars awarded was for the costs advanced by plaintiff. This theory is wholly at variance with the testimony of defendant, or entirely without testimony to support it. If adopted, then we would be required to accept the conclusion that the jury concluded that the failure of plaintiff to comply with his contract had necessitated the defendant employing other counsel to take care of the litigation, at an expense of fourteen dollars, when there is no testimony whatever as to what sum he expended, or the amount of the obligation he assumed on this account.

Again, he did not claim that the thirty-six dollars which he testified he had advanced was for other than court costs, so that he was not in a position to assert that this sum had been paid the plaintiff for services. It is impossible to reconcile the verdict with any theory of the case, or the testimony. In addition to the authority cited, we also call attention to *Burlington Interurban Ry. Co. v. Chapman*, 53 Colo. 28, 123 Pac. 649; *Leander v. Graves*, 45 Colo. 246; *Hassel v. Iron Works Co.*, 36 Colo. 353; *Robeson v. Miller*, 4 Colo. App. 313; *Jensen v. Nall*, 53 Colo. 212, 124 Pac. 471; *Ferrari v. Fuel Co.*, 53 Colo. 259, 125 Pac. 125.

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The judgment of the district court is reversed and the cause remanded for a new trial. *Reversed and Remanded.*

Mr. JUSTICE MUSSER and Mr. JUSTICE HILL concur.

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[No. 7643.]

## KING v. THE PEOPLE.

1. CRIMINAL LAW—*Instructions—Construed—Indictment for Murder*—An instruction declared that "deliberately" does not mean brooded over, or reflected upon, for a week, day or hour, "but an intent to kill executed by *the* defendant" in cold blood. The use of the definite article in referring to the accused was held not to be taken as the court's expression of a belief in his guilt.

2. ——*To Be Taken as a Whole*—What is omitted from one part of the charge may be effectually supplied by what is said elsewhere therein. The jury were told by one instruction that to warrant a verdict of guilty they must find that the killing was with premeditation. The failure to impose upon the prosecution the burden of establishing the defendant's guilt, by the evidence, beyond reasonable doubt, was *held* immaterial where this was prescribed elsewhere in the charge.

One instruction told the jury that if they should find from the evidence beyond reasonable doubt that another person than the accused committed the homicide, and from the evidence, beyond reasonable doubt, that the prisoner unlawfully, feloniously, premeditatedly, etc., abetted or assisted, etc., he also was guilty of murder in the first degree. By another instruction the two degrees of murder as defined in the statute were fully explained. *Held*, that the effect of the instruction first quoted was not to take away from the jury the degree of the homicide.

By one instruction the jury were told that if they should find from the evidence beyond reasonable doubt that the prisoner and one Fields, at a time and place named, wilfully, etc., engaged in an attempt to rob the deceased, and in this attempt Fields inflicted upon the deceased a mortal wound, and at the time, etc., the prisoner "was present, unlawfully, feloniously, etc., aiding, abetting, assisting, etc.," the prisoner was guilty of murder in the first degree. *Held*, that this instruction in no manner invaded the province of the jury.

By another instruction the jury were told that if Fields committed the homicide without premeditation, and that the prisoner aided therein, the prisoner was guilty of murder in the second degree, provided they should further find, etc., that the homicide was not com-

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mitted in an attempt to rob. *Held*, that thereby the jury were in effect instructed that though the homicide was without premeditation, it was murder in the first degree unless they should further, affirmatively, find that it was not committed in an attempt to rob. Whereas, if there was no premeditation, and the jury made no finding upon the question whether it was committed in an attempted robbery, the prisoner could be convicted only of murder in the second degree. And the evidence not being preserved in the record, it was not to be presumed that it supported only the charge of murder committed in the perpetration or attempted perpetration of a robbery, where the court had charged, not only upon that theory, but upon the theory of an actual preconceived design to take the life of the deceased, and upon the theory of murder in the second degree. The conviction was therefore reversed.

3. BILL OF EXCEPTIONS—*Not Required of Defeated Party*—No law makes it incumbent upon the defeated party, to bring the evidence into the record.

*Error to Elbert District Court.*—Hon. J. W. SHEAFOR, Judge.

Mr. H. A. HICKS and Mr. CHARLES ROACH, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, and Mr. CHARLES O'CONNOR, first assistant attorney general, for the people.

Mr. JUSTICE WHITE delivered the opinion of the court:

George King was tried for, and convicted of the murder of Felix Jackson, commonly known as Pete Jackson, and, upon the verdict of the jury, sentenced to death. He brings the case here for review.

In instructing the jury as to the meaning of the word "deliberately" the court stated, *inter alia,* that it does not mean "brooded over or reflected upon for a week, or a day, or an hour, but it means an intent to kill, executed by the defendant in a cool state of the blood," *et cetera,* and plaintiff in error claims that by the use of the adjective "the" instead of "a" before the word "defendant," the court thereby expressed an

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opinion that the "defendant on trial had in a cool state of the blood committed the crime charged."

We are not impressed with the criticism or the inference sought to be drawn from the language used. The clear meaning of the instruction is, that deliberation, as an element of the crime, did not exist, unless the jury found that the defendant, in the absence of overpowering passion, distinctly formed in his mind the intent to kill the deceased, and thereafter, however short the time, so executed the act of killing.

Instruction No. 8 told the jury that in order to warrant them in finding a verdict of murder in the first degree, "you must find, and so indicate in your verdict, that the killing was with deliberation and premeditation," and it is claimed that because they were not also told therein that such finding must be upon the evidence and beyond all reasonable doubt, it constitutes reversible error. The burden of proof to establish the guilt of defendant from the evidence beyond a reasonable doubt, was placed upon the people by Instruction No. 5, which also declared that the defendant must be presumed to be innocent of the crime charged against him until proven guilty by the evidence beyond a reasonable doubt. Moreover, the necessity of finding the truth of the charge from the evidence beyond all reasonable doubt was covered by several other instructions, and it is clear that no possible misconception in that respect could have entered the minds of the jurymen. It is not a case where there was given an incorrect and a correct instruction covering the same matter, but rather one wherein that which is said to be an omission from one instruction was supplemented and cured by the language of another forming a portion of the same charge.

Instruction No. 9 told the jury that if they believed and found from the evidence beyond a reasonable doubt that one "John Fields * * * wilfully, unlawfully, feloniously, deliberately, premeditatedly and with malice aforethought," killed and murdered the deceased, and "if you should further find and believe from the evidence beyond a reasonable doubt

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that the said defendant, George King, was present at the time and place aforesaid, and did then and there "unlawfully, wilfully, feloniously, deliberately, premeditatedly and of his malice aforethought, abet or assist" in such killing, "then you are instructed that the defendant, George King, is also guilty of murder of the first degree, and you should so find and state in your verdict." It is claimed that the instruction constitutes reversible error, because the question of the degree of murder is thereby taken from the jury. We do not believe that the instruction has the effect claimed. The statute declares murder to be the unlawful killing of a human being with malice aforethought, either express or implied, by any of the various means by which death may be occasioned. Sec. 1622, R. S., 1908. And section 1624, R. S., 1908, declares, *inter alia,* that murder which shall be perpetrated "by any kind of willful, deliberate and premeditated killing," or "which is committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed murder of the first degree." By Instruction No. 3 the two degrees of murder, as defined in the statute, were fully explained. So the substantial effect of Instruction No. 9 was to say to the jury that if they found from the evidence beyond a reasonable doubt that John Fields was guilty of murder in the first degree, and that the defendant was an accessory thereto during the fact, deliberately and premeditatedly assisting therein, he was likewise guilty of murder in the first degree, and they should so find by their verdict.

A like objection and criticism is made and urged against Instruction No. 10. It told the jury that if they found and believed from the evidence beyond a reasonable doubt that defendant and Fields, at a time and place named, did wilfully and feloniously engage in an attempt to take from the person of Jackson, by violence and force, or by violence and intimidation, his money, goods or other valuable things, and while so engaged Fields did unlawfully and feloniously shoot and kill Jackson, and at the time the shot was fired by Fields and the mortal wound inflicted upon Jackson, the defendant,

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George King, was present, unlawfully and feloniously aiding, abetting or assisting Fields in the attempt to take from Jackson his money, *et cetera,* then the defendant, King, would be guilty of murder in the first degree, and the jury should so find and state in their verdict.

While it is true that when the crime of murder is established the law declares it to be murder of the second, in the absence of circumstances showing it to have been murder of the first degree, nevertheless when the facts and circumstances in evidence are detailed in an instruction and embody only the elements of murder in the first degree as declared by the statute, it is not improper to state in an instruction that if the jury finds the existence of such facts beyond a reasonable doubt the defendant would be guilty of murder in the first degree, and the jury should so find. The statute makes a homicide committed in the perpetration or attempted perpetration of robbery, murder in the first degree, and the substantial effect of the instruction was to impose the duty upon the jury to ascertain whether the robbery had been committed or attempted, and, if so, whether the homicide had been committed in the perpetration thereof. If both were found in the affirmative, beyond a reasonable doubt, the statute fixes the homicide as murder of the first degree, and under such circumstances that degree is the only grade of the offense of murder the evidence will support. The rule as stated in 21 Cyc. 1067, is that, "where the absence of an actual preconceived design to take life does not reduce the grade of the offense, where the homicide was committed in the perpetration of certain other felonies, such as arson, burglary, rape, or robbery, the court need not, in such cases, instruct the jury as to minor included offenses." Under such circumstances there is but one grade of the offense, that is, murder in the first degree.

By Instruction No. 12, the jury were told, substantially, that if they found beyond a reasonable doubt that John Fields wilfully, unlawfully, feloniously and with malice aforethought, killed the deceased, and they did not find that such

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killing was with deliberation and premeditation, and they further found beyond a reasonable doubt that the defendant, King, so aided and assisted Fields in such killing, "then you are instructed that the defendant, George King, is guilty of murder of the second degree, and you should so find and state in your verdict; provided you further find from the evidence that at the time of the killing of the said Felix Jackson, commonly known as Pete Jackson, the said defendant and the said John Fields were not engaged in an attempt to rob the said Felix Jackson, commonly known as Pete Jackson, as defined in Instruction No. 10."

We think the instruction vicious. Its effect was to tell the jury that although the killing of deceased may have been without any deliberation or premeditation whatever, it was, nevertheless, murder in the first degree, unless they further found affirmatively that the homicide was not committed in the execution or attempted execution of robbery. Such is not the law. If the jury believed and found that the killing was without deliberation and premeditation, but attended with all the other elements of murder, the defendant was entitled to a verdict of murder in the second degree, though the jury entertained a reasonable doubt, and made no finding as to whether the homicide was or was not perpetrated in an attempt to rob. The principle applicable here is considered, and applied in *Pribble v. People*, 49 Colo. 210. If the case had been submitted solely upon the theory that the murder was committed in the perpetration or attempted perpetration of robbery, or if the evidence had been embodied in a bill of exceptions and made a part of the record, and we could clearly discover therefrom that the homicide had been so committed, it might be held that the instruction was without prejudice.—*Wickham v. People*, 41 Colo. 345. Under the first instance we might presume that all the issues made were presented by the instructions, and inasmuch as homicide committed in the perpetration or attempted perpetration of robbery is murder of the first degree, the defendant had suffered no injury; and

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under the second we might know that the defendant was in no wise prejudiced. But this record presents no such facts and conditions. Two theories of murder of the first degree were covered by the instructions. One that there was an actual preconceived design to take the life of the deceased; the other that there was no actual design to kill, but that the homicide was committed in the perpetration of a designated felony. An instruction also covered the theory of murder in the second degree, the jury being told that if they did not find the defendant guilty of murder of the first degree, as explained in the charge, it would be their duty to determine whether he was guilty of murder of the second degree as elsewhere defined in the instructions, and that they could find him guilty of either degree of murder, or not guilty as the evidence warranted. As the evidence was not brought into the record by a bill of exceptions, we must presume that it called for the instructions given. We can not presume that it supported only the theory of murder in the first degree committed in the perpetration, or attempted perpetration of robbery, when the court not only instructed upon that theory, but upon the theory of an actual preconceived design to take the life of the party killed, and also upon the theory of murder in the second degree. On the contrary, the controlling presumption must be that the instructions given presented only the issues involved.—*Garver v. Garver,* 52 Colo. 227; 121 Pac. 165. The instruction can not be applied, as a correct proposition of law, to any conceivable state of facts consistent with the record, and is governed by the rule stated in *Garver v. Garver, supra,* where, on page 167, we said: "While it is true, as claimed by defendant in error, if the evidence be not preserved by bill of exceptions, an instruction, erroneous as an abstract proposition of law, but which, as applied to a particular state of facts, may be correct, will not necessarily require the reversal of a case; nevertheless a contrary rule exists, and must be applied where the instruction is clearly erroneous and could not be applied as a correct proposition of law to any conceivable state of facts."

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In *Murray v. Johnson,* 45 Iowa 57, 58, the rule is recognized and applied in the following language: "The errors assigned relate solely to the instructions given and refused, and it is objected by the appellee that no part of the evidence is properly before us, and that, therefore, we cannot pass upon the pertinency of the instructions or determine they are erroneous. This does not necessarily follow, for if under no possible view that can be taken do the instructions embody correct propositions of law when applied to the issues presented by the pleadings, and if, on the contrary, they are clearly erroneous, then we not only have the power but it is our duty to pass upon and determine the questions presented."

And in *Downing v. State,* 10 Wyo. 373, 377, after stating that it has been repeatedly held that when the evidence is not in the record, a cause will not be reversed for giving to the jury an instruction which would be correct under any evidence that could have been admitted under the issues in the cause, the court says: "It is held, however, that if the instructions are in themselves radically wrong under any state of facts that could have been proven under the issues in the cause, and direct the minds of jury to an improper basis on which to place their verdict, the cause will be reversed, though the evidence is not in the record."

Every presumption in favor of the correctness of a ruling of the trial court is indulged by this court, and unless the record affirmatively discloses an error of which complaint is made, based upon the entire record, the judgment will be affirmed. But here the record affirmatively discloses prejudicial error under the issues in the cause as made by the pleadings and submitted to the jury. This is essentially true, because the evidence is no part of the record until made such by bill of exceptions, and no law makes it incumbent upon the losing party to bring the evidence into the record. So upon the whole record it appears affirmatively that prejudicial error was committed, and the substantial rights of the defendant disre-

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garded. The judgment is, therefore, reversed, and the cause remanded for a new trial.

*Judgment Reversed and Remanded.*

Decision *en banc.*

Mr. JUSTICE MUSSER specially concurs.

Mr. JUSTICE GABBERT and Mr. JUSTICE GARRIGUES dissent.

CHIEF JUSTICE CAMPBELL not participating.

Mr. JUSTICE MUSSER specially concurring:

I concur in the result reached by Mr. Justice White and in his opinion, except in so far as the views I herein express may conflict with or modify it.

It appears from the record in this case that at the trial an official stenographer was present and took down the testimony in shorthand, and that afterwards his shorthand notes were unintentionally destroyed. Apparently these notes were unwittingly picked up by some member of the stenographer's family at his home and with other papers, supposed to be of no value, thrown into a fire. Anyway the stenographer could not find them, and, therefore, could not furnish the testimony as is usual in such cases. Neither the defendant nor anyone for him had anything to do with the loss or destruction of these notes. Section 1472, Rev. Stats., provides that the judge of each judicial district may appoint a shorthand reporter to attend during any term of court and on the direction of the court take down in shorthand the testimony and other matters occurring at the trial. This section was in the General Laws of 1877, the General Statutes of 1883 and all statutes since. For years it has been the invariable custom for district judges to appoint stenographers for their respective districts to appear at every criminal trial, and under the court's direction, take down the testimony and other matters, and when a defendant wanted a bill of exceptions, containing all of the testimony in

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a case, if desired, it has been the custom invariably to obtain it from the stenographer. In accordance with that custom, and by virtue of the statute, a stenographer was present and was directed to take down the testimony in this particular case, and he did take it down. The defendant had the right, under such circumstances to assume that he would obtain the testimony from this stenographer for his bill of exceptions. He was not called upon to make any other arrangements than were, in virtue of the statute, provided by the direction of the court trying him, nor to anticipate that he would be called upon to procure that testimony from any other source, nor compelled to depend upon the uncertain memory of those present as to what the testimony was. In this condition of affairs, without any fault of his own, he was deprived of this statutory and usual, and in this case particular, source for obtaining the testimony for his bill of exceptions, solely on account of the fault of an official of the court, who did not properly care for his notes. It is for this reason that the testimony does not appear in the bill of exceptions. Of course he might have collected together some persons who were present at the trial, who might have detailed to him their version of what the testimony was, and the judge of the court, upon his own memory and the memory of these persons, may have put into the bill of exceptions something which they thought was the testimony.

It cannot be the law of this state that the defendant, under sentence of death, must suffer for the fault of the court stenographer, whose duty it was to preserve his notes, nor that the defendant, by reason of such official neglect, was compelled to resort to an uncertain and antiquated method of obtaining the testimony for his bill of exceptions, which has long ago been discarded in the practice in this state. If the defendant or his attorney were to blame for the loss of the notes, or if the stenographer had the notes and the defendant had failed or neglected to have them extended and put into the bill of exceptions, that is if the absence of the testimony from the

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bill of exceptions was caused by any fault, neglect or wrong of the defendant, an entirely different question would be presented. Here, the absence of the testimony is the fault of the official of the court, and not of the defendant. Unde. such circumstances, it is the law, in my judgment, that the instructions can be reviewed, notwithstanding the absence of the testimony. To say that they can not be is to take away from defendant the right of review, on account of the fault of the other party to the litigation. It was the officer of the court who was to blame for the condition of the record. Through no fault of his, but by reason of the officer's fault, it was impossible for the defendant to obtain the testimony and put it into his bill of exceptions, in accordance with the recognized practice in this state. He was entitled to pursue that practice, and was not required to resort to some discarded one. To say that he is cut off from his right to have the instructions reviewed, on account of the absence of the testimony, is to say that the prosecution, *The People,* shall profit by the fault of their official and that the defendant shall bear the burden of their fault. In the cases wherein this court has said that instructions can not be reviewed in the absence of the testimony no such circumstances existed as are here presented to account for such absence, and they are, therefore, not applicable. Let him who is at fault bear the resulting burden.

Therefore, forasmuch as the absence of the testimony was occasioned by the neglect of the court official, which neglect rendered the recognized and established practice impossible, it should be conclusively presumed as against the people that there was evidence that would warrant the jury in returning a verdict of murder in the second degree, because the court instructed in that degree. This being so, the defendant was entitled to a correct instruction. As Instruction No. 12 was erroneous, for the reasons stated by Mr. Justice White, the error could not be otherwise than prejudicial in the state of the testimony.

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Mr. JUSTICE GABBERT dissenting:

The province of this court is to redress real grievances, and not to decide moot questions. For this reason, it is a rule of universal application, that a judgment will not be reversed on account of an erroneous instruction, unless it appears probable that the jury were misled to the prejudice of the party appealing. It is not sufficient to show that error, in the abstract, was committed in giving an instruction. It must affirmatively appear that it was prejudicial. This can only be determined by a consideration of the evidence. In other words, a party bringing a case here for review cannot base reversible error on only part of the record or proceedings which led up to his conviction. It is said in the opinion that if the evidence were preserved by a bill of exceptions, it might appear that this instruction was not prejudicial. This announcement recognizes that a consideration of the testimony might disclose that an erroneous instruction was not prejudicial, but notwithstanding this conclusion, the opinion is based upon the erroneous theory, that it may be considered in the absence of the testimony, although whether or not it prejudiced the rights of the party bringing the case here for review can only be ascertained by a consideration of everything presented to the trial court. But the conclusion announced in the majority opinion, that an instruction may be considered without the testimony, permits reversible error to be predicated upon a part of the record and proceedings, instead of the whole, and hereafter we shall find that a party convicted of a crime will find it not only convenient, but to his advantage, when an instruction given does not correctly state the law, to bring up the instructions without the testimony, for, with the latter, it might conclusively appear that the error predicated upon the instruction did not prejudice his rights. It is hardly necessary to refer to the many cases where we have held, in both civil and criminal actions, that in the absence of the testimony, the instructions will not be

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reviewed. It is sought to take the case out of this general rule by stating, in effect, that Instruction No. 12 cannot be applied as a correct proposition of law to any conceivable state of facts consistent with the record. Applying this rule, the opinion, in my judgment, is not logical. True, the court instructed on murder in the first and second degrees, but it by no means follows that, in the absence of the testimony, we can say or assume there was testimony, when considering an instruction alone, to establish the fact that the life of Jackson was taken, except in the attempt to rob him.

But, waiving these matters, I cannot agree that Instruction No. 12 is erroneous, for the reason stated in the majority opinion, to the effect that the burden of proving that the homicide was not committed in an attempt to rob, was placed upon the defendant. Instruction No. 10 clearly advised the jury that murder committed in an attempt to rob constituted murder in the first degree. By Instruction No. 12 they were told what constituted murder in the second degree; and if they found the state of facts therein enumerated was established by the evidence beyond a reasonable doubt, then the defendant was only guilty of murder in the second degree, but that the killing of Jackson would not reduce it to that degree if it appeared from the testimony, beyond a reasonable doubt, that Jackson's life was taken in an attempt to rob him. Instructions must be considered as a whole, and when instructions 10 and 12 are read together, it appears to me that this was clearly the effect of the two instructions, and that under no circumstances could the jury have been misled or have understood that any burden was placed upon the defendant, whatever, to show a state of facts which would reduce the homicide to murder of the second degree.

Nor do the views expressed by Mr. Justice Musser change the situation. I have always understood the rule to be that a court of review never acted upon what was not, or could not, be brought before it. With all due deference to my learned associates, I respectfully submit that if the decision of the ma-

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jority is followed in the future, it will inevitably result in the reversal of convictions which would, and should, without question, have been sustained had it been declared, as it should be, that in the absence of the testimony, instructions will not be reviewed.

Now, what does the statement in the opinion of Mr. Justice White, to the effect that if the evidence were here, it might appear that the instruction upon which the reversal is based, mean, except to say that if one convicted of a crime only brings up the instructions for consideration, his case may be reversed, whereas, if he brought the testimony before the court by a bill of exceptions, it might not be. This is equivalent to saying, and in fact, does say, that a case may be reversed upon part of the proceedings before the trial court, when the proper rule is, that all matters before the trial court which in any manner bear upon the question presented for review must be considered before an alleged error will be declared prejudicial. That this must be the true rule is manifest from the expression just mentioned, for the very obvious reason that if the evidence were here, it might appear the instruction, although erroneous as a legal proposition, was not prejudicial. In other words, this expression of itself recognizes that, with the testimony before us, the judgment of the trial court might be affirmed, thus, in effect, saying that from all the proceedings it might appear that the error complained of was non-prejudicial. Does not this statement, then, logically recognize that the testimony must be considered before an instruction will be declared to be prejudicial, although erroneous? If it does (and I submit that this is the only logical conclusion to be deduced from it), then it must follow, as of course, that a person convicted of a crime cannot predicate alleged prejudicial error upon an instruction alone, when, with the testimony before us, it might appear that it was not. In brief, when it is recognized that a consideration of all the proceedings had in the lower court in any manner bearing on the question raised by an instruction, might show that it was with-

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out merit, the rule must be that they must be presented here in an appropriate manner before we can say that an error worked prejudice; otherwise, a defendant convicted of a crime is permitted to gain an advantage by not bringing up the testimony in the case. There may be decisions from other jurisdictions which tend to support the conclusion of the majority, that instructions may be reviewed in the absence of the testimony; but if they do, they are manifestly illogical, and ought not to be followed.

In my opinion the judgment of the district court should be affirmed.

The writer is authorized to state that Mr. Justice Garrigues concurs in this opinion.

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[No. 7841.]

## SHEELY v. THE PEOPLE.

1. STATUTES—*Construction*—A statute defining and denouncing a crime is to be strictly construed as against the state, but is not to be confined within narrower limits than the legislative intent. The legislative purpose is not to be destroyed by construction.

2. MAXIMS—*Of Construction*—e. g., "*Ejusdem generis*," "*Noscitur a sociis*," "*Expresio unius exclusio alterius*," are to be resorted to only when they afford aid in ascertaining the legislative intent.

The maxims interpreted, their application explained, and *held* that in the words "any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, attorney general, or prosecuting attorney, mayor, alderman, or member of city council, member of legislative assemely, *or other officer, ministerial or judicial*," in Rev. Stat. sec. 1720, it is not apparent that the legislature had in mind any particular class of officers, and that therefore these maxims afford no aid in the interpretation of the statute.

3. CRIMINAL LAW—*Bribery of Officers*—The county commissioners of a county are ministerial officers within the meaning of sec. 1720 Revised Statutes, and a conviction may be had under the statute, for the bribery of one of the county board.

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*Error to Weld District Court.*—Hon. NEIL F. GRAHAM, Judge.

Mr. GEO. Q. RICHMOND, Mr. O. N. HILTON, Mr. M. B. WALDRON and Mr. B. B. LASKA, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, Mr. CHARLES O'CONNOR, first assistant attorney general, Mr. GEO. A. CARLSON, district attorney, and Mr. JOHN T. JACOBS, for the people.

Mr. CHARLES B. WARD, *Amicus Curiae.*

Mr. JUSTICE MUSSER delivered the opinion of the court:

The plaintiff in error was sentenced for a term in the penitentiary for bribing one of the county commissioners of Weld county. The information was based upon section 1720, Rev. Stat., which, so far as is material to this review, is as follows:

"If any person shall directly or indirectly give any sum or sums of money * * * to any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, attorney general or prosecuting attorney, mayor, alderman or member of city council, member of the legislative assembly, or other officer, ministerial or judicial (but such fees as are allowed by law), with intent to induce or influence such officer to * * * the person so giving and the officer so receiving any money, * * * with intent or for the purpose of consideration aforesaid, shall be deemed guilty of bribery, and on conviction, * * *."

It is the contention of the plaintiff in error that a county commissioner is not included within the section, and that, therefore, the information did not charge an offense against any law of this state. To determine the question presented it is necessary, as it is in the case of any statute, to ascertain the intention of the legislature in enacting the law. For this purpose, such rules of construction as are favored by the courts

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and that may aid in reaching a correct determination may be employed. At the same time, it must be remembered that this is the criminal statute and should be strictly construed as against the state and liberally in favor of the accused, but the strictness to be employed or the liberality to be indulged must not be such as will confine the operation of the statute within limits narrower than those intended by the legislature, or destroy the intention of the law-making body. Counsel for plaintiff in error have called to our attention certain well known rules of statutory construction and insist that they should be applied to determine the intention of the legislature with respect to the statute in question. They are the rules of *ejusdem generis, noscitur a sociis* and *expressio unius est exclusio alterius.* We have no quarrel with these rules, nor the authorities cited with respect to them. They can be used only to aid the courts in ascertaining the legislative intent, and when they are to be used for that purpose they of course must be applicable and afford aid. If they do not afford any aid they are not to be resorted to.

The first two of the rules mentioned are closely related. This is one: "Where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class."—*State v. Krueger,* 134 Mo. 262. The second is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. That is, "by considering whether the word in question and the surrounding words are in fact *ejusdem generis* and referable to the same subject matter."—Brooms' Leg. Max. (7th Ed.), p. 439.

It is plain the statement of these rules that before they can be of any aid it must clearly appear that the legislature was thinking of a particular class of persons or objects. Now it does not appear that the legislature had in mind any particular class of officers when we read the section under consideration. The words are, "any judge, justice of the peace, sheriff,

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coroner, clerk, constable, jailer, attorney general or prosecuting attorney, mayor, alderman or member of city council, member of the legislative assembly, or other officer, ministerial or judicial." Here are enumerated executive, legislative and judicial officers; state, county and municipal officers; some that possess ministerial qualities in varying degrees; some that are alone in their office, others that are members of official bodies. It cannot be said that those mentioned are all of one particular class, so as to make the general words referable to a class. The other rule, that the mention of one thing is the exclusion of the other, is equally inapplicable. Specific enumeration of the officers mentioned does not exclude county commissioners if the general words that follow will fairly include them. It follows that these maxims or rules are not aids in the construction of this statute. If the statute relates to a county commissioner it must be because that officer is fairly included in the words "or other officer, ministerial or judicial." In the general scope of their duties commissioners are not judicial officers.

In *Merwin v. Boulder Co.*, 29 Colo. 169, this court held that passing on claims against the county, which is one of the duties of a county commissioner, is not a judicial act. Yet such an act requires the exercise of discretion and the ascertainment of facts. So in many other matters the county commissioners are vested with large discretionary powers. Some of them may approximate judicial powers, may be called quasi-judicial powers, but most of them are not really judicial. The commissioners are the agents of the county. When they act it is the county acting through them. Whatever they do is in the management and administration of the affairs of the county. They do not sit like a disinterested judge to hear and determine controversies between two parties, but they hear and determine the case of the county that they represent. They, in effect, ascertain facts and employ their discretion largely in their own cases and determine them similar to the the way any business man will do in the management of his

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own affairs. These are administrative acts rather than judicial.

County commissioners represent their county and have charge of its property and the management of its business concerns. Their duties are to administer the affairs of their county, and in that behalf to exercise such power as is expressly conferred upon them by the constitution and the statutes of the state, and such implied power as is reasonably necessary to the proper execution of the express power.—*Roberts v. People,* 9 Colo. 458; *Merwin v. Boulder Co., supra.*

The general scope of their duties being the administration of the affairs of the county, they must be administrative officers, and though vested with a large amount of discretion, which this court has many times said cannot be controlled by the courts, yet it is administrative discretion rather than judicial. Nor are they legislative officers. They do not make law, but are themselves wholly subject to the constitution and the statutes, and are concerned only in the administration of the business of the county as therein directed. If they are neither judicial nor legislative officers they must fall within the executive department, the administrative branch, and are to be classed as executive or administrative officers, as these terms are used interchangeably.—*State v. Loechner,* 65 Neb. 814.

So we come to the real question in the case. Did the legislature intend to cover county commissioners by including them within the designation of other ministerial officers? A primary rule of construction is that the intention of the legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in the light of the mischief to be remedied. While there is a rule requiring the strict construction of a penal statute that rule is not violated by giving to the words their full meaning in connection in which they are employed.—*Woodworth v. State,* 26 O. St. 196.

The mischief sought to be remedied by the statute is the bribery of public officers. Everyone must admit that it is just

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as necessary to prevent the bribery of a county commissioner as that of any other official, and that the bribery of a county commissioner is as much within the mischief sought to be remedied by this statute as the bribery of any other officer. A reading of the authorities discloses that the word "ministerial" is used with various shades of meaning. The plaintiff in error, by giving the word the very narrowest meaning it ever has, asserts that county commissioners are not embraced in that meaning. This may be true, but the meaning of the word in the statute under consideration is much more comprehensive than the one given it by counsel. Its precise meaning in any sentence depends upon the connection in which it is used. In the section under consideration the word "ministerial" is used in connection with the word "judicial." The words are used in opposition to one another, and the word "judicial" includes officers that the word "ministerial" does not. It is our duty then to ascertain the ordinary meaning of the word "ministerial" in the connection in which it is used in the section under consideration; that is, in opposition to the word "judicial." Used in this way, it is said in *People v. Jerome*, 73 N. Y. Sup. 306, that the act of every public official is either ministerial or judicial. One of the definitions of "ministerial" given in Webster's New International Dictionary is as follows: "Of the nature of those acts or duties belonging to the administration of the executive function; designating, or pertaining to, an act that a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority without regard to, or without the exercise of, his own judgment upon the propriety of the act done;—opposed to judicial." In *State v. The Governor*, 25 N. J. L. 331, it is said at page 350: "As contra-distinguished from judicial duties all executive duties are ministerial." The same classification that is made in these authorities with respect to acts and duties must be made with respect to officers. Those officers whose duties are judicial in their general scope are judicial officers and those whose duties are executive to the same ex-

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tent are executive officers. It, therefore, follows that as contra-distinguished from judicial officers all executive officers are ministerial. The management of the executive department of the government is the administration thereof, and those who are engaged in such management or administration are executive or administrative officers, and are themselves referred to as the administration.—1 Bouv. Dict. (Rawle's Rev.) 56.

"Ministration" in Webster's Dictionary is said to be "the act of ministering," and "minister" is defined to mean "administer." And in the same dictionary, one of the synonyms of "administer" is "minister," and "administerial" is defined as "pertaining to administration or to the executive part of the government." Now the fact that these executive, administrative or ministerial officers may and do exercise discretion and judgment in varying degree in the discharge of their administrative duties does not make them the less ministerial, for if it did there would be few administrative or ministerial officers. Most of them would be excluded and would have to be placed in a class that has not yet been defined by the authorities. The administration of government often requires, in a large degree, the exercise of discretion and judgment.

In *People v. Walter,* 68 N. Y. 403, the court, at page 410, uses the word "ministerial" in opposition to "judicial" and speaks of ministerial officers as exercising judgment and discretion and treats town commissioners as being in that class, notwithstanding that they were given discretion and judgment in the discharge of their duties. It follows from all this that county commissioners who are charged with the administration of the county government and the management of its affairs naturally fall into the class designated as ministerial, in the classification made in the statute under consideration. It is only by giving to the word the very narrowest meaning with which it is ever used—a meaning designated often in the authorities as purely ministerial—that an officer can be excluded from the ministerial class because he may ex-

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ercise discretion in the performance of his duties, and it is very plain that the meaning intended in the statute is much more comprehensive than the narrow one sought to be put upon it by the plaintiff in error. Aside from its connection with the word "judicial," "ministerial" is often used as synonomous with "administrative" or "executive," and is used to refer to acts requiring the exercise of discretion. In *People v. Salisbury,* 96 N. W. 936, it is said:

"The character of the act does not depend on the amount of discretion confided to the officer. There is much reason for saying that under our constitution all administrative or ministerial duties are executive in character, as they not only can be nothing else under the constitution, but they are all acts in the conduct of the government, i. e., the administration of public affairs through and under the regulations prescribed by law."

In *State v. Loechner, supra,* the statute under consideration provided that "any clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, prosecuting or district attorney, or any ministerial officer," who was guilty of certain acts should be fined, etc. A member of a board of education of a school district in a city was held to come under the provisions of the statute as being a ministerial officer. The duties of a member of the school board, as related to his district, were analogous to the duties of a county commissioner in this state, as related to his county, as is shown by the following quotation from the opinion:

"The members of the school board are unquestionably regarded by statute as the servants or agents of the corporation, selected for the purpose of conducting and managing its affairs in the manner and under the restrictions pointed out by statute. They are an administrative body charged with the duty of administering the law governing the public schools within the city composing the school district of which they are officers. It is their duty to administer the affairs of the corporation as directed by statute in the exercise of such pow-

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ers and authority as are vested in them. Doubtless in many instances in the performance of their duties they may exercise a discretion or judgment *quasi-judicial* in character, but this fact alone can not determine the class to which they belong, or bring them in the category of judicial officers."

From this the court held that the member was an administrative officer and proceeded to show that the word "ministerial" in the statute meant the same thing as "administrative," and that, therefore, the defendant belonged to the class of officers designated as "ministerial," and came within the statute.

Enough has been said to demonstrate that a county commissioner is not only fairly but plainly a ministerial officer in the sense intended by the statute in question, and, therefore, the judgment is affirmed. *Judgment affirmed.*

Decision *en banc.*

CHIEF JUSTICE CAMPBELL not participating.

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[No. 6416.]

## STATE BANK OF CHICAGO V. PLUMMER.

1. PRACTICE—*Bill of Particulars*—It seems to be the general rule that in proceedings to enforce a mechanic's lien, where the work was done for a stipulated price, no bill of particulars is required.

But where the contract entitled plaintiff to a certain monthly stipend "and his expenses" the defendant may require detailed information, concerning such expenses. So where the demand is for "material furnished."

2. ——*For What Demands a Lien Is Allowed*—Where by the contract plaintiff was employed as superintendent, etc., at a monthly salary, "and his expenses," the expenses were held to be as much a part of his compensation as the stated monthly allowance. But only such expenses as are incurred in the work for which he was employed are allowed to him.

3. ——*Time of Filing Statement of Lien—Single or Several Contracts*—The defendants, a railway company, and a tunnel com-

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pany projected a railway, one terminus of which was in the mountains, and the other in the plains, and a tunnel, to be part of such railway. The work was projected and planned as an entirety. There were three lien claimants, one an engineer, a part of whose claim was for general superintendence at a monthly salary, and other portions of it for the construction of particular parts of the tunnel, and laterals thereto, under separate contracts, and materials furnished in and for such construction. Another claimant had furnished material during different stages of the work, some to the defendant companies, directly, and some to the engineer while performing his contracts. The third claimant had sold and delivered ore cars to the railway company while work was proceeding in the tunnel. The last delivery made by this company was in 1903. There was no cessation of work upon the railroad and tunnel, for the period of thirty days, from a date prior to December 1st, 1902, to July 1st, 1905. Neither the railroad nor the tunnel had been completed at the time of the trial. All the lien claims were filed in the early days of July, 1905. *Held*, that as the completion of the tunnel as an entirety was planned in the beginning, and all the work was performed and all the material furnished in furtherance of this general design, what was done under these several contracts was not to be regarded as a separate structure or thing, nor were the several contracts to be regarded as distinct, for the purposes of the lien; that the liens attached to the railroad and tunnel as a whole, and that the several claims or statements of lien of the claimants were filed in apt time.

4. ——*Relation of Claim to the Beginning of the Work—Held*, further, that under Rev. Stat. sec. 4030 the liens related to the beginning of the work and were preferred to a mortgage subsequently recorded.

5. ——*Parties*—In an action by a material man or subcontractor the original contractor must be made party; and if a mortgagee is joined the owner must also be made party.

6. ——*Judgment Against Owner—Evidence Against Mortgagee*—The lien claimant must establish as against the mortgagee, not only the indebtedness of the owner, but that his claim is of a character entitling him to a lien. Therefore a judgment recovered by the lien claimant against the owner is admissible against the mortgagee, and conclusive that the claim has been adjudicated against the owner. But, as against the mortgagee it is not conclusive as to the amount thereby awarded. And where the judgment against the owner is not pleaded by the lien claimant the mortgagee may assail it by evidence of payment made by the owners for which no credit was given by the lien claimant, in taking judgment.

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7. PLEADING—*What Must Be Specially Pleaded*—In a proceeding to enforce a mechanic's lien the owner of the premises and a mortgagee thereof were made defendants. Judgments recovered by the lien claimants against the owner, were, though not pleaded, admitted in evidence as against the mortgagee. *Held*, that if excessive in amount they were to this extent a fraud upon the mortgagee, and the mortgagee having had no opportunity to plead this defense it was not to be excluded for the failure to plead it.

*Error to Teller District Court.*—Hon. JAMES OWENS, Judge.

Mr. CHARLES J. HUGHES, JR., Mr. HENRY C. CASSIDY and Mr. BARNWELL S. STUART, for plaintiff in error.

Mr. HENRY TROWBRIDGE, for defendants in error.

Mr. JUSTICE HILL delivered the opinion of the court:

The defendants in error, John T. Plummer, The Morrell Hardware Company and J. M. Parfet, instituted separate suits in the district court of the city and county of Denver to foreclose mechanics' liens against certain property of The Cripple Creek and Pueblo Railway Company and The Gold Exploration and Tunnel Company. This property is in Teller county. To these actions the above named owners, The State Bank of Chicago as trustee and W. H. Spurgeon were made parties defendants. Personal judgments by default were procured against the owners of the property before answer by the bank, and before the time for it to answer had expired (it being a non-resident). After its appearance and upon its application the cases were transferred to the district court of Teller county, where they were consolidated for trial, pertaining to the issues raised by the bank, which included the amount and validity of the liens, and if valid, the question of priority between them, and the bank's lien evidenced by a mortgage upon the same property, executed by the railway company in favor of the bank, as trustee for certain bond holders. The judgments were in favor of the several lien claimants decreeing

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the liens of Plummer and The Morrell Hardware Company superior to that of Parfet, and all three superior to the lien of the bank, to the property; foreclosure was ordered accordingly. The bank as trustee brings the case here for review upon error.

One hundred thirty-two assignments of error are presented. Those necessary to consider can be grouped into a few general contentions and will be disposed of accordingly.

It is claimed that the court erred in allowing the plaintiff Parfet to make certain amendments to his complaint during the trial. We cannot agree with counsel that the amendments added new causes of action. The action as against the bank was to foreclose a mechanic's lien for a certain amount, upon certain property in which it claimed an interest. The amounts covered by the amendments were included in this plaintiff's lien statement. The amount for which the lien was sought was greater in the original complaint than it was after the amendments were added. The amendments are now a part of the complaint, and as the case must be reversed for reasons hereafter stated, prior to a new trial the bank will have had ample time to make any preparation for any defense it may have thereto. This will eliminate any question concerning surprise or necessity for delay.

Prior to the trial the bank made a written demand upon the plaintiff Parfet for a bill of particulars covering each and every cause of action set forth in his complaint. This demand was not complied with; upon account of which the bank objected to the introduction of any testimony on Parfet's behalf; it also moved to strike all of his testimony. The objection and motion were overruled. The bank alleges, that his failure to furnish a bill of particulars was prejudicial error, upon account of which it was greatly handicapped in presenting its defense; that the provisions of general section 69, Revised Code, 1908, are applicable as well as mandatory. Upon behalf of Parfet it is claimed, that while the demand was made

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upon the entire cause of action, the objection was limited to the first three causes concerning which, by order of the court, he had previously been required to sub-divide upon the bank's motion; that the motion to strike was too broad, because it jointly attacked both first and sixth causes; that the complaint as amended as to the first three causes contained as particular an itemized statement as could be required; also, that section 69, *supra,* does not apply; that the bank's relief, if any, should have been by motion under general section 66, Revised Code, 1908.

It appears to be the general rule in actions to foreclose mechanics' liens where the work was to be for a certain contract price that no bill of particulars is necessary.—*Montpelier Light, etc., Co. v. Stephenson,* 22 Ind. App. 175; *Stephenson v. Ballard,* 50 Ind. 176; *White v. West,* 58 N. Y. Sup. 841; *Menzel v. Tubbs,* 51 Minn. 364.

This general rule applies to part of Parfet's causes of action, but as to a part of the first and sixth we are of opinion that the bank was entitled to more definite information. The first is based upon an agreement that he was to be paid a certain amount per month *and his expenses.* The sixth is for services rendered *and material furnished.* These expenses and material items fall within the rule calling for detailed information. We see no necessity for determining whether it should be secured under section 66 or 69, Revised Code, 1908, for in either event, in view of a new trial, opportunity should be granted to plaintiff Parfet to furnish this information and to introduce evidence to support it.

It is claimed that no lien can attach for the so-called Parfet expense account of $1,500, which it is alleged was allowed under his first cause of action. The total amount allowed Parfet was much smaller than claimed. Much evidence was admitted, under the statement that as the trial was to the court it would admit the evidence and consider only that which it deemed competent. For these reasons it is impossible to ascertain the items which went to make up the $27,-

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909.17, for which Parfet was decreed a lien. We might assume that this amount was awarded for other items than this expense account; there is evidence to sustain this assumption; but in view of a new trial, for other reasons, we think it competent to pass upon the contention concerning this claim. The complaint alleges and the evidence discloses that plaintiff Parfet was employed as superintendent, engineer and draftsman in the construction of the property at an agreed price of $250 per month *and his expenses.* Under these circumstances the expenses were part of the compensation to be paid him for his work while acting as superintendent, engineer and draftsman; therefore, it is just as much a part of his compensation as the $250 per month was.—*Lybrandt v. Eberly,* 36 Penn. St. 347.

In considering the items that are proper to be included in this expense account as lienable (in view of the different views of counsel) it is proper to state that they should be limited to his expenses as superintendent, draftsman or engineer *in the construction of the property.—R. A. G. & S. M. Co. v. Bouscher,* 9 Colo. 385.

It is claimed that none of the plaintiffs are entitled to a lien against the property involved, or if they are, they are inferior to the rights of the bank. The facts presenting these propositions are substantially as follows: Upon December the 3rd, 1902, the railway company gave a mortgage to the bank upon all of its property to secure its bonds in the sum of $250,000. This mortgage was filed for record in the office of the county clerk and recorder of Teller county December 13th, 1912; the bonds were sold; the money realized was principally in paying the expenses of extending a tunnel and laterals and placing railroad tracks therein, which one or both of the defendants (the tunnel and railway companies) were engaged in doing. This was to be a part of a railroad to be constructed by the railway company. The prospective terminal points of the railroad were Cripple Creek and Pueblo; the tunnel was to be utilized for railroad purposes.

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Prior to the execution and recording of the mortgage Parfet was employed as superintendent of the work by the railway company. In this capacity he performed services in superintending the work of extending the tunnel, in connection with the construction of the railroad, commencing in November, 1902, continuing to March 10th, 1904. This was at an agreed price of $250 per month and his expenses. During this period he incurred considerable expenses which were unpaid, as well as the greater amount of the $250 per month agreed upon. On March 10th, 1904, he entered into a written agreement with the railway company to construct three hundred feet of tunnel at a specified sum per foot. Between that date and July the 1st, 1905, he entered into similar contracts to construct other portions of the tunnel, including several laterals connecting with the main tunnel, during which period at the request of the railway company he furnished materials and supplies which were used. In addition he also performed labor and services in constructing the railroad and tunnel, in the way of superintending such work. To secure and enforce a lien for the amount still due him for services rendered and material furnished during this entire period, the plaintiff Parfet, on July 3rd, 1905, filed a lien statement in the office of the county clerk and recorder of Teller county. There is abundant testimony to the effect that there was no cessation of labor on the tunnel and railroad for a period of thirty days from prior to December the 1st, 1902, to July the 1st, 1905.

The Morrell Hardware Company's account is for material and supplies furnished at different stages in the progress of the work of constructing the tunnel, laterals, and railroad, some furnished to the railway and tunnel companies direct, and some furnished Parfet under some of his contracts. The last of these materials appears to have been furnished about July 6th, 1905, at which date the company filed its lien statement therefor in the office of the county clerk and recorder of Teller county.

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The Plummer claim is for ore cars sold and delivered to the defendant, the railway company, during the period the companies were doing work under the direction of Parfet as superintendent, between January 7th, 1903, and March 11th, 1903. The last item was delivered March 10th, 1903. This plaintiff's lien statement was filed July 6th, 1905, for the amount claimed to be due him. Both these materialmen introduced testimony to the effect that there was no cessation of labor for the period of thirty days between the commencement of the work on or before December the 1st, 1902, down to July the 1st, 1905. Neither the railroad nor tunnel had been completed up to this last named date, nor at the time of the trial.

The plaintiff in error contends, that each of the several items which go to make up the amounts included in the lien statements can only be regarded as having been rendered or furnished under separate and distinct contracts; that for lien purposes each of such contracts must be considered separate and distinct, and that the work provided to be done under each must be considered as a separate and entire structure within itself for the purposes of our lien act; that when thus considered the time within which to file a lien statement for the amount due under each contract began to run from the date each contract was completed; for which reasons none of the items can be made a basis for a lien against the property of the railway and tunnel companies, except those contracted for in 1905, and that when they are thus considered as standing alone, they cannot be made liens superior to that of the mortgage executed December 3rd, 1902, and recorded December 13th, same year.

As previously stated the evidence discloses that the work of constructing the tunnel and railroad was practically continuous from the time the work commenced on or before December 1st, 1902, down to July 1st, 1905, although under sundry different contracts and arrangements. But the agreed statements of fact and the evidence are conclusive of the fact,

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that it was all in furtherance of one general design and intention on the part of the railway and tunnel companies, viz, to complete as one structure a railroad and tunnel, which tunnel was to be a part of the railroad system; that the entire structure when completed was to be a railroad between Cripple Creek and Pueblo. This was what the railway company was incorporated for. It was agreed that this was the object of its incorporation; but even if we ignore this general design and intention of the parties and limit our consideration to the tunnel itself (in which practically all this work was done) we are driven to the same conclusion. It was not planned as mining tunnels are, to be run for a certain distance at one time, with the possibility that it might be run a further distance at some future time if desired by its owners, depending upon many conditions and circumstances; but to the contrary, the completion of this tunnel *in its entirety* was planned for at the time this work was commenced by Parfet. It was to be constructed for railroad purposes, in order that a railroad could run between certain points, passing through it. Without its completion the objects for which it was being constructed could not be accomplished; the laterals in connection therewith were also thus planned as a part thereof, as Parfet states in his testimony when asked "Q. Mr. Parfet, what was this drift and laterals run for, if anything, aside from the construction of the railroad? A. Run as feeders for the main line, to get business for the main line of the railroad." This line of testimony stands uncontradicted; when the facts are summed up in their entirety, if we apply the rule to the entire proposed railroad, or limit it to that portion included in the tunnel and its laterals, the result is the same. They were all planned and being constructed as an entirety, as one structure, the lesser included in the greater. The facts are quite similar to those in *Brooks v. Burlington & Southwestern R. Co.*, 101 U. S. 443, where a similar conclusion was reached. When the property is thus ascertained to be one structure or identity, we find nothing in our mechanics' lien

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act which requires that the work done under each contract be considered as a separate structure for the purposes of the act; but to the contrary, the act throughout contemplates that different portions or parts of the work will be done by different contractors, and that each may have a lien upon the entire property for the amount of his claim, for the work done upon or material furnished for a portion of the whole.—Section 4027, R. S., 1908.

This court has heretofore held, under section 4027, *supra,* that where the contract is for the construction of a part of a railroad or for materials furnished, used in constructing a part only, that the claimant is entitled to a lien upon the entire road.—*Barnes et al. v. The C. S. & C. C. D. Ry. Co.,* 42 Colo. 461.

We also held under the former act which was quite similar to section 4027, *supra,* where the contract was for the construction of a flume along the line of a canal, that this gave a lien upon the entire canal as between the lien claimant and the owner.—*Jarvis et al. v. State Bank of Fort Morgan et al.,* 22 Colo. 309.

These principles are applicable here. As between the lien claimants and the owners the liens, if valid, attach to the entire property.—*Brooks v. Burlington & S. W. R. Co.,* 101 U. S. 443; *Steger v. Arctic Refrigerating Co.,* 89 Tenn. 453; *Creer v. Cache Valley Canal Co.,* 4 Idaho 280; 2 Jones on Liens, section 1619; Boisot on Mechanics' Liens, section 190; Phillips on Mechanics' Liens (3rd Ed.), section 202; *Neilson et al. v. Iowa Eastern Railroad Co.,* 51 Iowa 184.

Section 4033, R. S., 1908, in part, reads:

"* * * all such lien statements claimed for labor and work by the day or piece, but without furnishing material therefor, must be filed for record after the last labor for which the lien claimed has been performed and at any time before the expiration of one month next after the completion of the building, structure or other improvement; all lien statements of all other sub-contractors and of all material men whose

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claims are either entirely or principally for materials, machinery or other fixtures, must be filed for record after the last labor is performed or the last material furnished for which the lien is claimed, and at any time before the expiration of two months next after the completion of such building, structure or other improvement, and the lien statements of all other principal contractors must be filed for record as aforesaid after the completion of their respective contracts and at any time within three months next after the completion of the building, structure or other improvement."

This section (which is different from the former act) is self-explanatory of the fact that the liens were not filed too early or too late. They were filed after the contract was performed, or the material furnished, for which the lien was claimed, and before the completion of the structure. As previously stated there had been no cessation of labor thereon from the time the first work commenced under Mr. Parfet until the date the liens were filed. This section does not require that they wait until the property is completed; that time might never arrive.—*Rice v. Rhone,* 49 Colo. 41; *The Lookout Lbr. Co. v. The Mansion Hotel and Belt Railway Co.,* 109 N. C. 658; *Levert v. Read,* 54 Ala. 529; *Young v. The Orpheus,* 119 Mass. 179; *Davies v. Miller,* 130 U. S. 284; *Hunter v. Truckee Lodge,* 14 Nev. 24; *Baldridge v. Morgan et al.,* 106 (N. M.) 342.

Section 4030, R. S., 1908, reads, in part:

"All liens, established by virtue of this act shall relate back to the time of the commencement of work under the contract between the owner and the first contractor; or, if said contract be not in writing, then such liens shall relate back to and take effect as of the time of the commencement of the work upon the structure or improvement, and shall have priority over any and every lien or encumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which, the lienor, under this act, did not have actual notice."

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The first contract with Parfet as superintendent is not shown to have been in writing. None of the contracts are shown to have ever been recorded and none of the provisions of section 4029, R. S., 1908, were ever complied with. If the first contract with Parfet is to be construed as a contract with a contractor within the meaning of section 4030, *supra*, then he commenced construction under it in November, 1902, or at least on or before December the 2nd, 1902. If we accept this position as correct, all these liens would relate back to and take effect as of that date. If this construction of his contract is not correct, and it was not a contract with a contractor within the meaning of this section, but while acting as superintendent, he was the agent of the companies, and they were in this manner engaged in the construction of the work, then, under this section, the liens would relate back to and take effect as of the date of the commencement of the work by the companies, under him as superintendent. This was on or before December 2nd, 1902, and prior to the date of the execution or recording of the mortgage; hence, accepting either position as correct, the result is the same, and under section 4030 the liens antedate the date of the execution of the mortgage which, by stipulation, is shown to have been December the 3rd, 1902; the date when it was filed for record was December 13th, 1902, for which reasons the liens became prior in time upon this property. This conclusion which is in harmony with the findings of the trial court makes unnecessary any consideration of the contention pertaining to the after acquired property clause in the mortgage, where the property was partially brought into existence by the lien claimants.

Over the objections of the defendant, the plaintiffs were allowed to introduce in evidence their judgments secured by default against the railway and tunnel companies. It is claimed that this was prejudicial error. We cannot agree with this contention. In an action by a sub-contractor or materialman to foreclose his lien the original contractor must be made a party to the suit. The claim must be adjudicated and estab-

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lished against the contractor in favor of the sub-contractor or materialman.—*Charles v. Hallack Lbr. Co.*, 22 Colo. 283; *Davis v. Mouat Lbr. Co.*, 2 Colo. App. 381; *Estey v. Lumber Co.*, 4 Colo. App. 165; *Marean v. Stanley*, 5 Colo. App. 335; *Clayton v. Farrar Lbr. Co.*, 119 Ga. 37; *Vreeland v. Ellsworth et al.*, 71 Iowa 347.

Where there is a mortgage upon the property and the mortgagee is made a party, the same rule would apply in requiring that the owner be made a party to the suit. In order for these plaintiffs to recover it was necessary for them to show in order to bind the mortgagee, not only that the owners were indebted to them in the amount alleged in the petition, but that the same was the kind of indebtedness which would sustain a lien against the property sought to be held, and both facts must be established against the owners. It must be adjudicated in this, or have been in some other case, as between them. Where, as in this case, the contention is between two rival claimants to the property, to-wit, lien claimants and mortgagee, it was necessary for the plaintiffs to establish their claims against the owners. The judgments were competent evidence to show that the claims had been established against the owners. They were estopped from denying their validity. It was conclusive against them that the personal liability had been established. This estops them from thereafter disputing the claim.—*Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65; *Batchelder v. Rand*, 117 Mass. 176.

There are reasons for the rule which requires this. To illustrate, suppose that service had not been made upon the railway company and no adjudication had against it; that the action had proceeded against the mortgagee; that the liens were established as against it, and in order to prevent foreclosure it paid the indebtedness and upon foreclosure of its mortgage it then sought to have the amount paid the lien claimants added to its lien and in this manner be subrogated to the rights of the lien claimants; that in answer to such petition the owner denied the indebtedness or alleged that a

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part of the indebtedness had been paid prior to the entry of the judgment and that it had never had its day in court concerning it. In such case it could not be estopped from so doing, for the reason that the claim had never been established against it. This reason for the general rule is apparent in most all cases, if a sub-contractor establishes his lien against the property and the owner is compelled to pay it (if not owing the principal contractor the amount) he has recourse upon him, but must be furnished with an adjudicated claim between the two contractors and not with a mere open account. We think the judgments competent for the purpose of showing that such claims had been established against the owners of the property. It was conclusive against the owners and was likewise conclusive against the mortgagee of that fact, to-wit, that the claim had been adjudicated against the owner.

In presenting its alleged defenses the bank attempted to prove that a part of the alleged indebtedness covered in the Parfet default judgment had been paid, prior to the time the judgment was secured, and prior to the date that his suit was instituted. All this line of testimony was excluded upon the theory that the judgment was conclusive of these facts and could not be impeached by the bank, except upon allegations and proof of fraud and collusion between the parties to the judgment. Many authorities are cited to show that judgments cannot be otherwise attacked.

In considering this question it is necessary to take into consideration the parties, the pleadings and record as they existed at the time this testimony was offered. The plaintiff Parfet instituted his action to foreclose a mechanic's lien, making as parties defendants the owners of the property and the mortgagee representing an interest therein. His complaint alleges that he performed services and furnished materials in the construction of the property, for which the owners owed him a certain amount, which had not been paid; that he was entitled to a lien therefor, etc. These were the allega-

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tions in the complaint which the bank was summoned to answer and which it did within the time allowed. In its answer and which it did within the time allowed. In its anof a part of this indebtedness. In his replication to this answer Parfet denied the allegation of payment. This was the condition of the pleadings when the evidence was offered. It will be observed that no judgment against the owners was plead, hence, the mortgagee had no opportunity by answering any pleading to attack for fraud or collusion, the validity of the judgment between Parfet and the owners; but if counsel are correct, regardless of these facts, upon account of the owners allowing a default judgment to be taken against them, the bank is precluded from presenting a defense which is made a direct issue by pleadings between it and Parfet. If this is the correct rule, in this class of cases a portion of the issues as made up by the pleadings might or might not be issues upon which evidence could be received at the time of the trial, depending upon whether certain other defendants might or might not allow default judgments to be taken against them. We do not think this reasoning sound, but are of opinion that the fact that the owners allowed judgments to be taken by default against them did not preclude the mortgagee from showing that a part of this alleged indebtedness had been paid prior to the time the suit was brought. If the bank could show this, then the judgment was in law a fraud as against it. The issues as made up involved the payment of a part of the indebtedness, the ruling was that upon account of the default judgment against the owners, the bank was not entitled to offer evidence to sustain this defense, for the reason that the owners had not seen fit to defend the action, although the bank had sought to do so.

In *Brooks v. Burlington & Southwestern R. Co.*, 101 U. S. 443, it was held that judgments in favor of sub-contractors against the owners are not conclusive as to the validity of the lien against a mortgagee not a party to the action. We gather this from the following language in the opinion:

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"It is also to be observed that O'Hara & Co. and Wells, French & Co., had both commenced legal proceedings in the proper courts of the state to establish their liens before the present foreclosure suit was begun by appellants, and that in those courts, after a contest with the railway company, judgments were rendered establishing their liens, and it was after this that they were made defendants to the present foreclosure suit.

To these proceedings, Barnes, the principal contractor, and the railway company were parties, and we take it for granted that as against them the judgment of the state court establishes the validity of the lien. The appellants being no party to these proceedings are not bound by that judgment, and both the validity of the lien as against them, and whether the lien, if valid, is paramount to that of the mortgage, are the questions for consideration here."

In *Sargent v. Salmond et al.*, 27 Me. 539, it was held that a judgment is evidence of the amount of indebtedness between the parties to it, but is not binding as to third persons not parties or privies thereto. A creditor of Salmond, after having obtained a judgment against him, sought to recover in satisfaction of his judgment certain real estate which it was alleged belonged to the defendant Salmond, but was held in the name of Mary P. Salmond. In the latter action she sought to attack the validity of the indebtedness upon which the judgment was rendered. It was held she had that right. In commenting upon this phase of the case, at page 547, the court said:

"The judgment is evidence against William Salmond, the debtor therein, of the amount of indebtedness; but it is not binding against the other defendant, who was not a party to the judgment or the suit in which it was rendered. She is entitled to impeach it in this suit, commenced for the purpose of affecting her personally, or the interest in the property, which she claims as belonging to her. If she has received property of the other defendant fraudulently as against the

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creditors of the latter, she cannot be bound to restore it beyond an amount sufficient to cover the just and legal claims of creditors. When the bill, answers and proof are considered, it satisfactorily appears, that the complainant took judgment against William Salmond for a sum larger than that to which he had a just and legal claim, and it does not conclude the defendant, Mary P. Salmond."

In *Montgomery et al. v. Rich et al.*, 3 Tenn. Ch. Rep. 660, it was held that a *bona fide* purchaser to land may successfully contest a claim of the creditor of the vendor by virtue of mechanics' liens fixed by attachment and judgment, by showing that the lien debt had been paid before the sale and judgment. In commenting upon this subject the court, at pages 663-664, in part, said:

"The case before us is that of a third person who is seeking to avoid the effect of the judgment of a justice on realty, the title to which was acquired by such third person previous to the rendition of the judgment. It is not exactly a collateral attack on the judgment. It is rather the assertion of a right which, the bill insists, should not be affected by the judgment. And the question is not so much the invalidity of the judgment, as of the complainant's right to contest with the defendants, as between them, facts which the defendants may claim as settled in their favor, against Long, by the judgment.

As a general principle, a transaction between two parties in a judicial proceeding will not be binding on a third party. * * * "it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers." * * * Accordingly, it has been held that a mortgagee of land is not

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estopped by a judgment, in an action between his mortgagor and a prior mortgagee, rendered after the execution of the second mortgage, but may litigate the amount due upon the mortgage, notwithstanding the prior judgment.—*Campbell v Hall,* 16 N. Y. 575. * * * The complainants have the right, therefore, to contest with the successful litigant those matters which bear upon their rights, just as if no such judgment had been rendered. And they have proved by Long himself that the defendants' debt, so far as it could claim to be a mechanics' lien on their land, was paid before the attachment suit was instituted. * * * The burden of proof is thus thrown upon the defendants, as between them and complainants, to show affirmatively the existence of a mechanics' lien for any portion of the debt claimed."

In *Clark et al. v. Moore,* 64 Ill. 273, it was held, that where certain lien claimants had not been made parties to a foreclosure under mechanics' liens by others, and where property had been sold thereunder at an inadequate price, that on application by them the court was justified in setting the former sale and decree aside; that by the decree and sale the other lien claimants had acquired no right that barred or precluded those not made parties from asserting their rights; that when the decree and sale were set aside the other lien claimants were then at liberty to contest the amount or validity of any or all of the liens being asserted against the property, precisely as they could have done had they been parties to the first proceeding; that if the allowance was too large in favor of any one of the plaintiffs and endangered any portion of the other claims, that they, for their own protection, had the unquestioned right to resist and have it reduced to its just and fair amount, just the same as though the former judgment had not been rendered; that the findings of the court in the first decree was not conclusive against those not then parties to the action. The same rule is announced in Boisot on Mechanics' Liens, section 670.

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In *Early v. Albertson,* Vol. 2 Weekly Notes of Cases (Penn.) 369, it was held that terre tenants should always have an opportunity to defend against the validity of lien claimants.

In *Field v. Oberteuffer,* 2 Phila. Rep. 271, it was held that the amount of a judgment confessed on mechanics' lien claims is not conclusive against an auditor of the court in making his report for its distribution where the defendant's real estate had been sold at sheriff's sale and the funds paid into court. In passing upon this subject at page 273 the court said:

"We agree with the auditor that the judgment *confessed* upon the claim filed, ought not to have been deemed *conclusive* evidence of the sum due, but no case could better illustrate the propriety of this decision, than that which has given rise to the exception. For it appears plainly on the auditor's investigation, that the *judgment* had been *advisedly* confessed for a much larger sum than was due as mechanics' claim under the acts of assembly."

Without approving or disapproving as a whole the rulings in the cases last cited, we think, as stated in the last case that the facts here are also of that class which gives rise to the exception. This record discloses, that Mr. Parfet was one of the promoters as well as one of the original stockholders of the railway company; that he was its first superintendent of construction; he testified that certain gentlemen would become interested therein only on condition that he be selected in such capacity; that as the representative of the company he disbursed in construction a large amount of the money received from the sale of the bonds represented by the plaintiff in error.

Under such circumstances, without making any intimation that there is anything wrong with the amount of Mr. Parfet's claim, or that there is any fraud or collusion, where, as here, it is made an issue by the pleadings, we think that

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the bank should have the opportunity to defend against any and all portions of the claim, and if payments have been made, as its pleadings alleged, it should have the right to show these facts, regardless of the default judgment entered against the owners. This principle is recognized in *Gordon-Tiger Co. v. Loomer,* 50 Colo. 409. A purchaser had acquired from the decedent's heirs certain real estate which might be jeopardized by the allowance of certain claims against the estate, for that reason we held that he had the right to intervene and defend against the claims.

That portion of the decree fixing the amount of their claims and declaring them liens upon the property including the order of their rank or class in favor of the plaintiffs, John T. Plummer and The Morrell Hardware Company, as between themselves and the plaintiff Parfet, and as against the defendants is affirmed. For the reasons stated the judgment in favor of the plaintiff J. M. Parfet is reversed and the cause as between him and the bank is remanded for a new trial upon the questions only of the amount due him, including the question of payments and what items are lienable under his expense account, in harmony with the views herein expressed. The ultimate decree rendered to include an order of foreclosure in favor of the plaintiff Plummer and The Morrell Hardware Company similar to the former decree in this respect. The plaintiff in error will recover one-half of its costs for this writ of error against the defendant in error Parfet, the defendants in error Plummer and The Morrell Hardware Company will recover their costs upon this writ of error against the plaintiff in error. *Affirmed in part.*

*Reversed and Remanded in part.*

Decision *en banc.*

Mr. JUSTICE GABBERT dissents.

CHIEF JUSTICE CAMPBELL not participating.

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Mr. JUSTICE GABBERT, dissenting in part:

In concur in the reversal of the judgment of the trial court, but dissent from so much of the opinion as holds that the lien claimants are, or may be, entitled to any relief giving them rights in the property involved superior to that of the mortgagee. The liens of claimants cannot relate back to the inception of the work in December, 1902, except it be upon the theory that the work done and materials furnished between that date and July, 1905, was in furtherance of one general design on the part of the railway and tunnel companies to complete, as one structure, so much of the tunnel and railway as was completed on the latter date. There is not the slightest testimony to indicate any such design. On the contrary, in my opinion, it is clear from the testimony, pleadings and agreed statement of facts, that the work of constructing a railroad and tunnel during the period for which the respective liens are claimed, was not one entire undertaking continuously and uninterruptedly followed up as one piece of work, and carried on in furtherance of one general design; but that the work prosecuted during this period was on a series of disconnected, separate and distinct structures or improvements, constructed either by the owners or by contractors under separate and distinct contracts, and that the materials furnished were under separate and distinct contracts, corresponding in point of time with the periods and during which the separate and disconnected portions of the tunnel and railway were constructed. Such being the facts, it follows on principle and authority, that where labor or materials are furnished under separate and distinct contracts for the construction of separate and distinct portions of a tunnel or railway, a lien statement must be filed for what was done or furnished under each contract, within the statutory period after its completion.—27 Cyc. 144; *Sweet et al. v. James*, 2. R. I. 270; *Hobkirk v. Portland B. B. Club*, 44 Oregon 605; *King et al. v. Shipbuilding Co.*,

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50 Oh. St. 320; *Nye et al. v. Berger,* 52 Neb. 758; *Livermore v. Wright,* 33 Mo. 31.

Applying this rule, it is apparent that neither of the liens claimed can be enforced as superior to the mortgage lien of the bank.

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# JANUARY TERM 1913.

[No. 7978.]

## IN RE INTERROGATORIES OF THE SENATE.

1. LEGISLATIVE OR EXECUTIVE QUESTIONS—*Doctrine of the Court*—It is the settled doctrine of the court that where a question is propounded by either the legislative or executive department, under sec. 3, art. VI of the constitution, the court will decide for itself whether the occasion is one demanding a response.

2. ——*Where Private Rights Are Involved*, the court will not give an *ex parte* opinion in response to such interrogatories.

Before the canvass of the vote, the person chosen to the office of lieutenant governor at the election held in November, A. D. 1912, departed this life. The person chosen to the same office at the previous biennial election was assuming to hold over, and preside in the sessions of the senate, though the senate, under sec. 10 of art. V of the constitution had elected a president *pro tem.* The senate having propounded to the court question as to the right of this person to so hold over, under the provisions of the constitution, *held*, that inasmuch as the officer so assuming to hold over was unquestionably an officer *de facto*, and his acts as such necessarily valid, the question was not one of sufficient importance or solemnity to demand the expression of an opinion by the court.

The opinion of the court is in response to the following communication from the senate:

"*To the Honorable Supreme Court of the State of Colorado:* Pursuant to the provisions of the constitution of the state of Colorado in that behalf made and provided, the senate, one of the houses of the nineteenth general assembly, now in session, does hereby respectfully submit certain questions hereinafter propounded, and does respectfully request that you furnish and deliver your opinion thereon at the earliest possible moment; and the court is hereby advised of the following

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facts necessary to be stated for the rendition of judicial opinion upon said questions, viz.:

A general election was held in the state of Colorado on the fifth day of November, A. D. 1912, pursuant to the constitution and laws of said state; that at said election one Benjamin F. Montgomery was a candidate upon the democratic ticket for the office of lieutenant governor of said state, for the term beginning on the second Tuesday of January, A. D. 1913; that at the canvass of the votes duly held by the joint session of both houses of the nineteenth general assembly, on the 3rd day of January, A. D. 1913, it appeared from said canvass that Benjamin F. Montgomery, candidate for lieutenant governor on the democratic ticket, received a plurality of all votes cast.

That on the 30th day of December, and prior to the canvass of said votes, the said Benjamin F. Montgomery departed this life; that at the general election held on the 7th day of November, A. D. 1910, one Stephen R. Fitzgarrald was duly elected lieutenant governor of the state, took the oath of office and has been and now is the duly elected, qualified and acting lieutenant governor of the state of Colorado, and was such at the time of the death of said Benjamin F. Montgomery, and at the time of the canvass of said votes; that it also appears and is a fact that at the time of the death of the said Benjamin F. Montgomery the said vote had not been canvassed, and no certificate of election had been issued to said Benjamin F. Montgomery, or to any other person for the office of lieutenant governor, and none has yet been issued; that Benjamin F. Montgomery or no other person voted upon at the election held in November, 1912, for the office of lieutenant governor has taken and filed the oath of office as lieutenant governor of the state of Colorado, pursuant to said election and canvass.

That at a session of the senate held on the 3rd day of January, A. D. 1913, the said Stephen R. Fitzgarrald, lieutenant governor and president of the senate, made the following

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statement in reply to a request made by senator Burris from the second district:

'Senator from the Second, and Gentlemen of the Senate:

I first want to say that the death of Col. Montgomery has made no greater wound in any heart in this state than in mine, outside of his own family. He was a splendid citizen, and our state has lost a grand character. His record is an open book and he has left as a heritage to the people of this state and to his friends something that we would all be proud to leave for ourselves. His voice was always lifted for the betterment of the people of this state, and Colorado is much poorer today than it was before he died. But the good old man is gone, and this situation presents itself to me personally. It has given me a great deal of concern as to what was my duty in the premises. I have had the advice and counsel of a great many good friends, and have had the assistance of some of the very best lawyers of the state, who have volunteered their services to look up the matter for me. I have consulted a great many authorities myself, in order that I might come to a conclusion befitting a gentleman and a member of the executive department of this state. I am glad that you have asked this question at this time, so that the record may show my position in the matter. I have come to this conclusion: That it is my duty to hold this office until my successor has been elected and duly qualified as provided by the constitution of this state. After having arrived at this conclusion, no one could do more, and no one would want to do less, so that you may know that after the 14th of this month I shall consider it my duty to exercise the duties of this office until my successor has duly qualified, and I want to say to this senate that I am not going to object to whatever action you may take, only to preserve my legal rights. I am just as anxious to know whether I will be the lieutenant governor after January 14th as you are. Nevertheless, I desire to preserve my legal rights and that it is only upon legal grounds that I have stated somewhat my reasons, so the senate may take their own

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course and I will take mine. I have been advised by my friends and counsel that it is my duty to hold the office until it is determined who is my legal successor, so you may take whatever action you please, and I thank you for this opportunity of expressing myself and I don't think any good citizen would do differently than I have determined to do in this matter.'

That on Tuesday, the 7th day of January, A. D. 1913, the senate of the nineteenth general assembly, elected William H. Adams president *pro tem* of the said body, and thereafter said Adams took the oath of office as president *pro tem* and entered upon his duties as such officer.

NOW, THEREFORE, In view of said existing conditions and to enable the senate of the nineteenth general assembly of the state of Colorado to discharge its legal and constitutional duties in the premises,

BE IT RESOLVED BY THE SENATE of the State of Colorado that the following questions be submitted to the supreme court in the state of Colorado for its opinion in the premises, which said questions are as follows, towit:

Interrogatory 1: Does said Stephen R. Fitzgarrald, the present duly elected, qualified and acting lieutenant governor of the state of Colorado, continue to hold the office of lieutenant governor on and after the 2nd Tuesday of January, A. D. 1913, under the provisions of sections 1, 3, 6, 14 and 15 of article IV, and sections 1 and 10 of article XII of the constitution of the state of Colorado?

Interrogatory 2: If the said Stephen R. Fitzgarrald does not hold the said office of lieutenant governor of the state of Colorado, who, under the provisions of the constitution above referred to, or what officer is entitled to perform the duties of the office of lieutenant governor, on and after the second Tuesday of January, A. D. 1913?

BE IT RESOLVED, That said court is hereby respectfully advised and informed that in the opinion of the said senate, the questions, and each of them, so submitted are import-

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ant questions upon a solemn occasion, and that the situation is so grave and serious that the highest public interest requires that the said honorable supreme court shall, at the earliest possible moment, render and deliver its opinion to the said senate upon each, every and all of the foregoing questions."

The questions presented were discussed by Mr. W. H. Malone, Mr. Stephen R. Fitzgarrald, Mr. John D. Milliken and Mr. Benjamin Griffith.

MR. JUSTICE WHITE delivered the opinion of the court:

In considering interrogatories propounded under section 3 of article VI of the constitution, this court, soon after the adoption of the constitutional provision, established certain rules governing the practice to be observed in the exercise of the jurisdiction conferred. As the authority conferred and duty imposed upon the court to give its opinion is "upon important questions, upon solemn occasions," and not whensoever required by the governor, the senate or the house of representatives, it was held that the duty rested finally upon the court to determine for itself as to the solemnity of the occasion and the importance of the questions propounded. Moreover, that the question must relate to purely public rights, be propounded upon a solemn occasion, and possess a peculiar or inherent importance not belonging to all questions of the kind; that executive questions must be exclusively *publici juris,* and legislative ones be connected with pending legislation, and relate either to the constitutionality thereof or to matters connected therewith of purely public right.—*In the Matter of the Constitutionality of Senate Bill No.* 65, 12 Colo. 466, 471; *In the Matter of Senate Resolution on the Subject of Irrigation,* 9 Colo. 620; *In Re Appropriations,* 13 Colo. 316, 321; *In Re Speakership,* 15 Colo. 520; *In Re Fire and Excise Com.,* 19 Colo. 482; *In Re House Bill No.* 99, 26 Colo. 140; *In Re Senate Resolution No.* 10, 33 Colo. 307.

At an early date, speaking through chief justice Helm, this court, in *In the Matter of the Constitutionality of Senate Bill No.* 65, 12 Colo. 466, 471, 472, said: "We feel con-

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strained to repeat and emphasize the thought heretofore expressed, that the utmost vigilance and caution be exercised by both the general assembly and the court in acting under this novel constitutional authority. There cannot well be too much moderation in the premises. We note that, in those states which permit consultation with the justices, the privilege seems to be less often invoked than it has been here. The attorney general is the natural as well as the statutory legal adviser of the executive and legislative departments. His counsel should be solicited; and only as a *dernier ressort,* upon the most important questions and the most solemn occasions, should the court be requested to act."

He further therein said that, "While the question must be one relating to purely public rights, it can only be propounded upon solemn occasions, and it must possess a peculiar or inherent importance not belonging to all questions of the kind. * * * Upon mature investigation and reflection we are of the opinion that executive questions must be exclusively *juris publici,* and that legislative questions must be connected with pending legislation, and relate either to the constitutionality thereof, or to matters connected therewith, of purely public right. We believe that the accuracy as well as the wisdom of this interpretation will commend themselves alike to the legislative judgment and the legal mind."

And in referring to that decision Mr. Justice Elliott, speaking for the court in *In Re Appropriations, supra,* said: "The latter opinion was announced after much consideration, and is authority for saying that this court must decide for itself, as to any given question, whether or not it should exercise the jurisdiction of answering the same; and that only questions of law *publici juris,* and not questions affecting private or corporate rights, should be thus answered. That decision was based upon the fundamental doctrine that for this court to answer questions of the latter class, *ex parte,* would inevitably result in disposing of the rights or claims of litigants without due process of law, without counsel, and with-

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out allowing them their day in court."

And in *In Re Fire and Excise Commissioners, supra,* it is said: "While we concede to the governor full liberty to submit such questions as he may deem consistent with his executive powers, this court reserves for itself the right to express its opinion freely, in whole or in part, or not at all, as it shall deem consistent with its judicial powers and constitutional obligation." It is further therein said: "Were it not for the threatened dangers by force, military and otherwise, the question propounded would not be important nor the occasion solemn." And in the same opinion, on page 499, upon the question of an incumbent of an office attempting to hold over in opposition to an executive order of removal, it is said: "* * * if the executive order of removal is questioned by the incumbent, the courts have the power, and it is exclusively within their province, to pass upon such objections and determine as between the respective claimants the right to the office in question, and the law provides a plain and adequate procedure for that purpose; and a speedy determination of such question is assured by express statute. Mills' An. Stats., p. 830. All law-abiding citizens will, and all others should be required to, submit such controversies to these tribunals for settlement."

And in *In Re Senate Resolution No.* 10, *supra,* "Private rights, the title to an office, or the construction of an existing statute will not be determined in an *ex parte* proceeding in answer to a question from either the legislative or executive departments."

These rules have been applied, and such has been the practice in this state for a fourth of a century. Occasionally, it may be, as pointed out in *In Re House Bill No.* 99, *supra,* "There was a departure from it, but an examination of those cases shows that it was for reasons held conducive to the public welfare, and because the cases were of extreme emergency. * * * When we thus made answer we deviated somewhat from the established practice to which, at the first opportunity,

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we now return. In doing so, we are satisfied that we are pursuing the only safe course, and one that commends itself to the judgment of the thoughtful and earnest legislator, as well as to the members of the bar and publicists who have given to the subject careful attention."

Those cases, nevertheless, it should be observed, carefully avoided determining any private rights. There was involved in *In Re Speakership,* the legality of the organization of the house of representatives, each of two rival organizations claiming to constitute that body. Incidentally, the court was asked, among other things, to say who was then the speaker of the house of representatives. We did not give a direct answer to the question. On the contrary, we held substantially, that as the constitution invests the house of representatives with the power to judge of the election and qualification of its members, and likewise invests it with the power to elect its own speaker, and such power is continuing and no other department of the government has any voice in the matter, such branch of the general assembly "must assume and bear the responsibility for the exercise of their powers," and that it could remove and elect another speaker at its pleasure.

*In Re Fire and Excise Commissioners, supra,* involved the right of the executive to remove certain fire and excise commissioners from office in the city of Denver, appoint others in their stead, and induct the latter into office by force. As the court had previously held that the power of removal and appointment in that respect was vested in the executive, it therein reaffirmed the holding and declared that the constitutional oath of the executive to "take care that the laws be faithfully executed" imposed no obligation upon him to enforce his order of removal, and that a proper regard for the reputation and peace of the community would dictate that the appointees institute proper proceedings in court to determine their rights to the office. In other words, the *Speakership* case declared that the house of representatives was the tribunal to ascertain and determine who was its speaker. While

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the *Fire Commissioners'* case declared that the governor was the person invested by law to hear charges against and remove for cause the fire and excise commissioners of the city of Denver and to appoint their successors. This was in effect saying only that whatsoever person, body or tribunal, invested by law with the power to appoint or remove from public office, has the exclusive right to exercise the power, and it is the duty of good citizens to accept and abide by that which is so done in the premises.

The matters involved in *In Re Senate Resolution No.* 10, *supra*, concerned a contest for the governorship, pending before the general assembly. It was therein pointed out that the contestor and the contestee were actual litigants before the general assembly, having submitted their respective claims to the determination of that body, and as the questions submitted to the court for answer arose out of that contest, the parties litigant were necessarily before the court as to the matters involved, and it was not an *ex parte* proceeding.

Testing the questions propounded by the rules established, it is evident that we should not assume jurisdiction in the premises. The occasion is not of sufficient solemnity, and private rights are involved. It is conceded that when the nineteenth general assembly convened it was the duty of Stephen R. Fitzgarrald to appear in, and preside over the deliberations of the senate during the term for which he was elected. Sec. 14, art. IV, constitution. It is likewise conceded that it was the duty of the senate, at the beginning of its session, to elect one of its members president *pro tempore*. Sec. 10, art. V, constitution. We are advised by the resolution that such duties were duly performed, and the only circumstance in addition thereto is, that on the 3rd day of January, during the time Fitzgerrald was unquestionably the lieutenant governor, he stated to the senate, in answer to some inquiry made, that he had concluded it was his duty, under sections 1 and 10 of article XII of the constitution, to hold the office of lieutenant governor after the 14th of January until a successor ap-

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peared, elected and qualified as such officer, or until such time as it was legally determined otherwise. This is the extent of the controversy as disclosed by the resolution and questions propounded. If Montgomery had lived, qualified for the office and assumed the duties thereof, the senate would, nevertheless, have elected a president *pro tempore*. So it does not appear that the orderly procedure of the senate has been affected by that which has occurred, or that Fitzgarrald's claimed right to perform the duties of lieutenant governor been legally questioned. Whether Fitzgarrald is rightfully entitled to hold over, his acts as such officer are necessarily valid. If he be not the *de jure* lieutenant governor, he is unquestionably such officer *de facto*. This is elementary. 29 Cyc., p. 1392. He was legally in the office. He is still therein, actually performing the duties thereof. Under these circumstances, surely the occasion is not one of solemnity, and we are not authorized under the constitutional provision to answer questions propounded to the end that solemn occasions may not arise. It is only upon solemn occasions that we are authorized to act. Moreover, it is not to be presumed that either public officials or private citizens will disregard the orderly procedure of the law, but, on the contrary, when claimed rights are questioned, or sought to be questioned, resort will be had to the proper tribunals established for the purpos of determining such matters.

Furthermore, to answer the questions propounded would, as hereinbefore stated, involve a determination of private rights in an *ex parte* proceeding. It would necessarily determine the title to the office of lieutenant governor and to whom the salary pertaining to such office properly belongs. If Stephen R. Fitzgarrald is the lieutenant governor, entitled to perform the duties of that office, he is likewise entitled to receive the emoluments thereof, but if he is not the lieutenant governor, and some other person is entitled to perform the duties of such office, the latter person is entitled to receive the

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emoluments of the office.—*People ex rel. v. Cornforth,* 34 Colo. 107.

Such private rights can not be determined in an *ex parte* proceeding to which such possible claimants of the office, and the salary pertaining thereto, are in no wise parties. If any public official or tax-paying elector desires to question the right of Mr. Fitzgarrald to hold the office of lieutenant governor, the law has provided a tribunal and adequate procedure for that purpose, wherein both private and public rights may be properly considered and protected. Such was the case and procedure in *People ex rel. v. Cornforth, supra,* wherein this court assumed original jurisdiction.

We shall continue, as heretofore, to observe the requirements of all constitutional provisions, including the one now under consideration, and take pleasure in rendering such assistance to every department of government as shall be consistent with our duty and in harmony with a sound exposition of the constitution. To adhere to the rules established by this court we deem wiser and more seemly than to place a different interpretation upon a constitutional provision that would necessarily bring confusion and uncertainty. We are persuaded that this course will commend itself to both the legislative and the legal mind.

In view of the foregoing consideration we respectfully ask the honorable senate to recall the questions propounded.

Decision *en banc.*

Mr. JUSTICE HILL and Mr. JUSTICE SCOTT dissent.

Mr. JUSTICE HILL dissenting:

I cannot concur in the conclusion reached by the majority. As I read the resolution from the senate it discloses, that the candidate who received the highest number of votes for the office of lieutenant governor at the election held in November, 1912, departed this life after the election; that he never qualified as such officer; that the present senate, pur-

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suant to the provisions of section 10 of article V of the constitution, elected one of their number as president *pro tempore;* that the lieutenant governor elected in November, 1910, claims the right to the office for the present biennial term, or the right to hold over, as it is termed, until his successor is elected and qualifies. Section 14 of article IV of the constitution reads: "The lieutenant governor shall be president of the senate, and shall vote only when the senate is equally divided. In case of the absence, impeachment, or disqualification from any cause of the lieutenant governor, or when he shall hold the office of governor, then the president *pro tempore* of the senate shall perform the duties of the lieutenant governor, until the vacancy is filled or the disability removed." Upon account of the above and other sections of the constitution, and the circumstances above set forth, it is evident that the senate is in doubt as to the proper person to be recognized as its presiding officer after January 14th, 1913, when both the lieutenant governor elected in 1910 and the president *pro tempore* of the senate elected at the beginning of the present regular session are present and claim the right to so act. Under such circumstances this becomes an important question and to my mind presents a solemn occasion.

The senate, in order to be advised as to the proper interpretation to be given the different sections of the constitution upon this subject, so that they may act advisedly and thus avoid any attack upon, or criticism pertaining to, their proceedings, have submitted the interrogatories. As I view the questions, they are, in part, *publici juris* and in my opinion should be answered to the extent of placing an interpretation upon these different sections of the constitution sufficient to cover the question concerning the presiding officer of the senate. In my judgment, this position is supported by the following opinions of this court.—*In Re Senate Resolution No.* 10, *Concerning Governorship Contest,* 33 Colo. 307; *In Re Fire and Excise Commissioners,* 19 Colo. 482; *In Re Speakership of the House of Representatives,* 15 Colo. 520.

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Mr. JUSTICE SCOTT dissenting:

I cannot concur in the conclusion of the court, to refuse in this instance to give its opinion upon the questions propounded by the senate. The provision of section 3, article VI, of the constitution of Colorado, is as follows:

"The supreme court shall give its opinion upon important questions, upon solemn occasions, when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decisions of said court."

I am not unmindful of the fact that this court has assumed to itself in such cases, the absolute right to determine whether or not a question is important, or the occasion solemn. I cannot agree that this was the intendment of this constitutional provision. Such power of the court is in my judgment unwarranted, either by the language or purpose of this provision. The language is distinctly mandatory upon the supreme court, and there is not even a suggestion of discretion upon its part. The word "require" as used in this connection can have no meaning other than the right to demand as by right and authority. This right to demand is specifically conferred upon two of the co-ordinate branches of the government, and the duty of the other branch of the government to obey is to my mind clear.

It is true that this court has said, 33 Colo. 321, "The department propounding the question in the first instance determines whether an occasion exists which justifies its submission." But qualifies this declaration by asserting, "But it remains for the court to finally determine that proposition." I regard this qualification as a clear assumption of power, in no way to be reconciled with the language of the section of the constitution, or the essence of the proposition stated by the court. The right to propound the question rests, necessarily, upon the right to determine that the occasion exists, and only after such determination. That question having been deter-

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mined by the department having the declared right, it is illogical and incongruous to say that such determination may be reviewed and set aside by another department to which the question is addressed, having no express authority to do so. This would reduce the constitutional enactment to an absurdity. The people through their constitution, have the same power to command courts, as legislatures and executives are commanded, and it is not for the former to complain or attempt to decree otherwise. Certainly where the right to thus determine a given state of facts, is conferred upon one department of the state government, it is not within the province of another department to assume to be the sole arbiter as to its importance.

But the power to determine that an occasion is important or solemn, is not such an unusual or extensive power as to justify the assumption of doubt as to its meaning. Greater and entirely exclusive powers have been conferred upon both the executive and the legislature charged with the responsibilities of government. It would therefore seem that executives and legislators have at least equal opportunities and equal judgment with courts, as to the importance or solemnity of problems presented to them.

It is not necessary to recite the many grave questions which the legislature alone may determine. The same may be said as to the executive. This court has said that he may even declare a state of insurrection and suspend the writ of habeas corpus without consulting any other department of the state government. Surely then, he may be trusted to determine when such an important or solemn occasion is presented to him as to require the lagol advice of the court. Likewise either branch of the general assembly.

Courts should not impute to executives or legislatures, the doing of foolish or useless acts. These should be regarded as expressing their solemn conviction within their respective spheres. To refuse to answer the questions in this instance is to refuse to obey that which I regard as an imperative consti-

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tutional mandate, or on the other hand, to assume a power neither expressed nor reasonably implied.

In the case of *Opinions of Justices* (Maine) 51 Atl. 224, cited by counsel, while the majority of the court held to the view now expressed by the majority here, yet the argument of the dissenting justices is so convincing, and so replete with judicial authority as to appear unanswerable. This case was decided as late as 1902, and it is there said:

"Against this long and unbroken array of precedents for more than a century (40 years under the Massachusetts constitution and 80 years under our own similar constitution), and against the opinions of the eminent jurists cited, we have in this state but the one late solitary instance where the justices refused to answer a question duly propounded, that in 1891, when the justices refused to answer the inquiry of the governor as to his power to remove a county attorney. 85 Me. 545, 127 Atl. 454."

And again:

"The early practice under any constitutional provision is admittedly of very great, and even controlling, force when such practice does not conflict with the express words of such provision. It is well known as matter of history that members of the convention drafting the constitution afterward became governors, legislators, and judges under it. They best knew the scope and purpose of its provisions. The people who themselves voted upon the adoption of the constitution would more quickly notice any departure from its letter or spirit. If, therefore, we find a comparatively uniform practice under a constitutional provision by the earlier incumbents of office, acquiesced in by the persons or officers unfavorably affected by it, and not opposed to clear, express language of the constitution, such practice is a better, safer guide to the real meaning and scope of the provision than any verbal, grammatical, or even philosophical interpretation by subsequent generations in after years. Broom, Leg. Max. 658, 884; *Cohen v. Virginia*, 6 Wheat. 418, 5 L. Ed. 257; *Rhode Island v. Massachusetts*,

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12 Pet. 657, 9 L. Ed. 1233; *Rogers v. Goodwin,* 2 Mass. 475; Gray, C. J., in *Opinion of Justices,* 126 Mass. 594.

In obedience to the constitution as thus authoritatively interpretated by the unvarying practice of more than a century, —40 years in Massachusetts to the time of the separation, and then in Maine for 70 years more until 1891,—we give our opinion upon the questions submitted briefly as follows:"

But if the view of the majority of the court be admitted, still under the decisions of this court, the questions here should be answered. While the form of the questions submitted may be unfortunate, yet these in fact simply ask the court for an interpretation of certain constitutional provisions, seemingly necessary for guidance of the senate.

It is urged that these should not be answered because the questions involves a private right, that is to say the title to an office, that of lieutenant governor, and that under the rule of the court such title can only be determined in another and different proceeding. It must be admitted that to an extent, a private right is involved, but it likewise involves a question of grave public concern, compared with which the private right sinks into insignificance.

In the *Speakership Case,* 15 Colo. 520, the question propounded by the house of representatives, was as to the power of that body to declare the office of speaker vacant, and the court answered that it had such power. Plainly this involved a constitutional private right, to-wit: title to the office of speaker, which like the office of lieutenant governor, carries with it the right of succession to the governorship.

In the case, *In Re Senate Resolution No.* 10, 33 Colo. 307, the question as to whether or not the joint assembly had the power to declare the office of governor vacant, was answered by this court. This was a contest for the office of governor, was purely a political matter over which this court could have no control, and it would be difficult to understand how the office of lieutenant governor can involve a clearer case of private right.

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*In Re Fire etc. Commissioners,* 19 Colo. 482, involved the power of the governor under the law as it then stood, to remove the fire and police commission of the city of Denver. These were offices carrying salaries and the court in that case admits the existence of private right, but declares that the gravity of the situation demands an answer to the question propounded.

This case clearly illustrates the unsoundness of the rule adopted by the majority in the matter before us, and makes clear the reasoning in *Opinion of Justices, supra,* having reference to the dissenting opinion as follows:

"Whether the questions submitted are important, or whether there be sufficient occasion for their solution, is not itself a question of law, or a judicial question. These are rather political questions in the broad sense of that term. When the requirement is made by the house of representatives, they are pre-eminently questions for the house itself to consider and determine. The house is a political agent of the people. It has the sole power of impeachment. It is the grand inquest. With the senate and the governor, it is the judge of what is for the people's welfare, is charged with the duty of seeking out abuses, disorders, and irregularities in the public service and is also charged with the duty of their reform or removal. The justices are by the constitution (article 3, sec. 2), excluded from that sphere of duty and action, and limited to judicial questions. Even in cases where all the facts and conditions are public, and known to all the justices, it is certainly doubtful if they are to override the judgment of the representatives of the people, that those acts and conditions render the questions of law important and the occasion solemn. But the justices can never be sure they know all the facts and conditions. There may be—perhaps in this case—many facts and conditions known to the house and not known to the justices, clearly showing the given question to be important, and the occasion sufficiently solemn. It has never been the practice, nor is the house obliged by anything in the constitution,

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to state facts affirmatively showing the question to be important and the occasion solemn. We do not think the justices should treat the house as a suitor, nor its order like a petition demurrable for want of sufficient allegation of facts."

But if we are to assume the exclusive right to determine whether or not the question is important and the occasion grave, we cannot escape the conclusion that such is the case before us.

The questions by the senate presuppose a desire upon its part to obey the constitution, and we cannot doubt that the several constitutional provisions, under the state of facts presented, admit of serious question.

The lieutenant governor is not a member of the senate. That body under the constitution, consists of thirty-five members, elected from districts, created by law, and of which membership the lieutenant governor cannot be one. He presides over the senate simply by virtue of his office as lieutenant governor, and which duty is simply incidental to his office. If he is not lieutenant governor, can he preside, or exercise any of the powers and duties of the presiding officer? The actual official duties of this officer as such are limited, Micawber like, to simply waiting for something to turn up, and when this something does turn up he no longer performs the duties of lieutenant governor, but rather the duties of governor.

It is suggested that even though he may not be the lieutenant governor, in fact, yet his acts are valid as a *de facto* official.

From what I have said of the duties of the lieutenant governor as such, it would seem that as a *de facto* official, he would have as much substance and power as the proverbial hole in a doughnut. Can he preside and give validity to his acts as the president of the senate, unless he is the actual lieutenant governor? He cannot preside as president *pro tem*, for the senate may elect only one of its members to such position.

It is urged that in permitting him to preside, the senate thus recognizes the validity of his acts. Does the mere recog-

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nition by the senate, validate an invalid vote? Can the senate be said to be charged and bound by mere recognition, when in the exercise of all its power it cannot elect or place in authority, the official so said to be recognized?

The constitution confers upon the president of the senate the power to cast the deciding vote when the senate is equally divided. Thus while he is not a member of the senate, yet in this particular he is given certain powers of a legislator. Will this court say that there can be such a thing as a *de facto* legislator, casting votes and making laws? To my mind this is inconceivable.

Again, it is the constitutional requirement that the presiding officer of the senate shall in the presence of the senate, sign all bills and joint resolutions passed by the assembly. This seems to be clearly mandatory. Are we ready to say that one who is not the lieutenant governor, and who is not eligible to election by the senate, as president *pro tem,* may sign them? Are we ready to say that if such bills are not signed by the proper officer that they are not for such reason invalidated?

The questions are purely legal and the members of the senate are not presumed to be learned in the law, yet all these legal questions which may vitally effect the whole people of the state are before them. Are these matters not important and can this court say that the occasion is not sufficiently grave as to require its advice when requested?

I am clearly convinced that the matter is of such importance as to make the refusal of the court to answer a serious error. Beside, I do not understand that the answer requested is anything but advisory, and may be reviewed or changed upon a more formal and complete investigation. I regard the constitutional mandate binding on the court, and against which we may not interpose a rule of procedure, a precedent, or the convenience of the court. The senate is entitled to know and the whole people are entitled to know the view of the court upon so serious a legal question.

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[No. 7474.]

## EMPIRE RANCH & CATTLE CO. v. ZEHR.

LIMITATIONS—*Section 4073 of the Revised Statutes*, applies to personal actions only and is no bar to a bill to remove a specific cloud upon the title to land*.

*Appeal from Washington District Court.*—Hon. H. P. BURKE, Judge.

Mr. R. H. GILMORE, for appellant.

Messrs. MUNSON & MUNSON, for appellee.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. This action was commenced by the patent owner to quiet his title against a tax deed, each party claiming title in fee simple. Defendant's adverse claim was a tax deed, void on its face. It was admitted on the trial that the land was patented to the plaintiff. Defendant in support of its title relied upon and offered in evidence a tax deed, which the court excluded because it was void upon its face, and, defendant offering no further evidence, entered judgment for the plaintiff.

2. Defendant pleaded the five years' equity statute of limitations, which in part is as follows:

"Bills of relief * * * in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not after."—Sec. 4073, Rev. Stats., 1908.

The "other cases" therein provided for, are: "Bills for relief on the ground of fraud," and "The existence of a trust not cognizable by the courts of common law."

While the tax deed was not admitted in evidence, the pleadings admitted it was recorded January 5, 1903, and the

*Syllabus by Garrigues, J.

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complaint was filed December 28, 1908. Defendant's contention is, that as soon as the tax deed was recorded, it became a cloud on plaintiff's title; that his cause of action then accrued; that this is a bill for relief to remove the cloud, and in as much as it was not brought until almost six years after the cause of action accrued, that it is barred by this statute.

There is no doubt if the tax deed was a cloud upon plaintiff's title, that the cause of action to quiet it accrued as soon as it was filed for record, and, as the suit was not brought until almost six years thereafter, the action was barred if the statute applies to a case of this kind; but the case of *Munson v. Marks,* 52 Colo. 553; 124 Pac. 187, is decisive of the question. It is there held that this statute is a limitation upon personal actions only, and was never intended to apply to actions affecting real estate. The judgment will therefore be affirmed. *Affirmed.*

CHIEF JUSTICE MUSSER and MR. JUSTICE SCOTT concur.

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[No. 7515.]

## MARKS v. MORRIS.

LIMITATIONS—*Color of Title—Payment of Taxes*—A treasurer's deed is not color of title until recorded. One who, claiming under a void tax deed, would avail of the seven-year limitation prescribed by Rev. Stat., sec. 4090, must show the lapse of the statutory period, not only between the first payment of taxes and the institution of the action of the paramount owner, but between the record of his deed and the institution of this action.

*Appeal from Logan District Court.*—Hon. H. P. BURKE, Judge.

Messrs. MCCONLEY & HINKLEY, for appellant.

MR. JOHN F. MAIL, for appellee.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

This is a code action for the possession of real property. Defendant has a tax deed, void on its face, which he claims vests the legal title in him, under the following statute:

"Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title."—Sec. 4090, Rev. Stats., 1908.

The tax deed was recorded April 19, 1900; first payment of taxes thereunder, was December 18, 1901; this action was commenced May 16, 1908.

This statute was no defense unless seven years had elapsed between the date of the first payment of taxes, and the date of bringing the action. *Empire Co. v. Howell,* 22 Colo. App. 585; and a tax deed is not color of title until recorded.—*Sayre v. Sage,* 47 Colo. 559.

In a case of this character, where conflicting titles are involved, before the seven years' statute can operate as a limitation, there must not only be seven years between the date the suit is brought and the first payment of taxes; but there also must be that length of time between the date of record of a tax deed, and the commencement of the action. In this case, while more than seven years elapsed between the date the deed was recorded and the commencement of the action, less than seven years had expired between the first payment of taxes and the bringing of the suit. The judgment is therefore affirmed. *Affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

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[No. 7624.]

## HENWOOD v. THE PEOPLE.

1. CRIMINAL LAW—*Murder—Death of One by a Blow Intended for Another*—One engaged in an affray with a particular person kills both that person and an innocent bystander. If guilty of murder in the case of his adversary, he is guilty of murder in that of the bystander.

2. ——*Information For*, includes all the lower grades of homicide.

3. ——*Evidence—Manslaughter*—Where upon the trial of an information for murder there is evidence sufficient to go to the jury of circumstances tending to excite in the accused a sudden heat of passion, the question whether they amount to the statutory provocation, so as to reduce the offense to the grade of manslaughter (Rev. Stat., sec. 1625,) is for the jury.

4. ——*Involuntary Manslaughter*—One who, exercising the right of self-defense, discharges a pistol at his adversary, but acts without due regard to the presence of others, and unintentionally kills a bystander, may be declared guilty of involuntary manslaughter.

5. ——*Instructions*—Where upon the trial of an information for a murder there is evidence sufficient to go to the jury tending to show that the prisoner delivered the fatal shot under the influence of a sudden and irresistible passion, it is error to take from the jury the question of the degree of the crime. The jury must be left free to find guilty of manslaughter, even though the prisoner, testifying in his own behalf, asserts that he acted only in self-defense.

*Error to Denver District Court.*—Hon. GREELEY W. WHITFORD, Judge.

Mr. JOHN T. BOTTOM and Mr. MILNOR E. GLEAVES, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, Mr. ARCHIBALD A. LEE, deputy attorney general, Mr. THEODORE M. STUART, JR., assistant attorney general, Mr. WILLIS V. ELLIOTT, district attorney, and Mr. JOHN HORNE CHILES, chief deputy district attorney, for the people.

Mr. JUSTICE GABBERT delivered the opinion of the court:

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The plaintiff in error, whom we shall hereafter designate as defendant, was convicted of murder in the second degree and sentenced to the penitentiary for life. He maintains that prejudicial error was committed at the trial in several particulars, only a few of which, however, will be considered.

The defendant shot and killed Sylvester L. Von Phul. For this homicide an information was filed charging him with murder. It was claimed that some of the shots fired by defendant at Von Phul struck George E. Copeland and caused his death, and an information was also filed, charging the defendant with the murder of Copeland. The defendant was tried for the offense so charged, with the result above noted. Copeland was a by-stander, taking no part whatever in the difficulty between the defendant and Von Phul, so that if the defendant committed an offense in taking the life of Von Phul, he was guilty of a like offense in causing the death of Copeland.—*Ryan v. People,* 50 Colo. 99.

At the outset counsel for defendant contends the evidence does not establish that any of the shots fired by defendant took effect in the body of Copeland, and for this reason urges the court should have sustained a motion to instruct the jury to return a verdict of not guilty at the conclusion of the testimony on the part of the people. We do not deem it necessary to either review or go into an extended discussion of the testimony bearing on this subject, as, in our opinion, it was ample to sustain the finding of the jury that shots fired by defendant at Von Phul struck and caused the death of Copeland.

The testimony on the part of the prosecution bearing on the taking of the life of Von Phul is substantially as follows: Several persons, including Von Phul, Copeland and the defendant, were in the bar-room of the Brown Palace hotel. The latter and others with him, at his invitation, were about to take a drink at the bar. Von Phul and a friend or acquaintance of his were also standing at the bar, waiting to be served. After the defendant had ordered the drinks for his

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guests, he approached Von Phul, to whom he made a remark, which the witnesses for the people did not hear or understand, when Von Phul turned, and with his fist struck him in the face, knocking him down, his head, as one of the witnesses for the people expressed it, striking the floor "hard." As to what then occurred the witnesses do not altogether agree. On behalf of the prosecution, the testimony is to the effect that Von Phul, after knocking the defendant down, turned his back upon him, and faced the bar-tender; that he did not attempt to pursue the defendant, or to draw a revolver, or put his hand to his hip pocket, or make any demonstration, that he intended to pursue the defendant; that the latter raised from the floor and attempted to draw his revolver; that it caught in his clothing; that he unfastened it; that two men seized and tried to prevent him from shooting; that he pushed both aside, and commenced to shoot at Von Phul, and that during this time Von Phul did not advance on defendant, or make any hostile demonstration whatever. The defendant testified that on the afternoon preceding the shooting, he had gone to Von Phul's room in the Brown Palace hotel, where they were both guests, for the purpose of inducing him to return letters a woman had written to Von Phul, and which she had commissioned him to obtain; that on this occasion Von Phul struck him on the left temple with a shoe-tree, and drew a revolver, saying that he would kill the defendant if he were armed, but as he was not, wouldn't do so because, as Von Phul expressed it, "They would have it on me." The defendant, also, testified that on the following day, and preceding the night of the encounter in the bar-room, he was informed that Von Phul had threatened to kill him; that these threats were communicated to him orally, and by a note written by the woman mentioned, and that after learning of these threats, he purchased the revolver with which he did the shooting. With respect to the affray in the bar-room, the defendant testified that Von Phul entered the room with a friend after he did, and stood at the bar talking with this

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friend; that he changed positions, which brought the defendant and Von Phul quite close; that he, the defendant, then said to Von Phul, "Won't you consider what happened yesterday afternoon," to which Von Phul replied: "I am going upstairs and I am going to grab that grey-haired (using a foul epithet) by the hair and pull him out of there, and show him who is master here;" that he, the defendant, then said: "I am not going to allow you to get that over me," and that Von Phul then said: "I will get you first, you understand," following this remark with a blow with his right hand on the point of defendant's chin, which felled him to the floor and dazed him for a minute. As to what then occurred, the defendant stated: "As I lifted myself up from the ground, I remember this part, and that was, to see that man reach for the gun. I am sure he reached for it, and it was only a movement on my part to protect my life, and I pulled my pistol and shot him. I fired all the shots the gun contained, but I don't know how many." In brief, as we understand the testimony of defendant, it is, that as he was rising from the floor, Von Phul looked at him, and placed his right hand at his hip pocket as though to draw a revolver, and that for this reason, he drew his weapon and fired at Von Phul. Three of the shots fired struck Von Phul, one in his right wrist and the other two in his back. The defendant also testified he thought Von Phul was armed. There was testimony on the part of the people to prove that he was not, and probably some evidence tending to prove that the defendant knew he was not. The bar-tender testified that Von Phul stepped from his friend's left to his right; that this change of position placed him next to the defendant; that Von Phul asked his friend to be permitted to make this change, saying to him: "There is a dirty ————————: I licked him once, and will lick him again, but he won't fight." This witness also stated: "Henwood did not go over to Von Phul; Von Phul went over to Henwood," and that Von Phul was looking at the defendant at the time the shots were fired. Another witness on behalf

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of defendant testified that Von Phul, after knocking the defendant down, was almost facing him, with his right hand on his hip pocket, when the defendant commenced shooting; while a third witness for the defendant testified that Von Phul, after knocking defendant down, looked at him with a sneer, and had one hand resting on the bar and the other on his hip, and that at the time the defendant was drawing his revolver, Von Phul was looking directly at him. There was also testimony on the part of the people to the effect that defendant had threatened to kill Von Phul. This the defendant denied. The testimony stands undisputed that the defendant did not fire a single shot until after he was knocked down, and that he commenced shooting as soon thereafter as he could draw his revolver.

The court instructed the jury on the law of murder in the first and second degree, and also on the law of self-defense, but stated to the jury: "There is no manslaughter in this case."

Sections 1625 to 1628, inclusive, R. S., 1908, are as follows:

"Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection."

"In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing."

"The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible, for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of

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reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder."

"Involuntary manslaughter shall consist in the killing of a human being without any intent so to do; in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence in an unlawful manner, provided always, that where such involuntary killing shall happen in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

These statutory provisions are a recognition of the frailty of human nature, the purpose of which is to reduce a homicide committed in the circumstances therein contemplated to the grade of manslaughter, either voluntary or involuntary, as the facts may warrant. From the statutes above quoted it appears that the unlawful killing of a human being, without malice and deliberation, upon a sudden heat of passion caused by a provocation apparently sufficient to excite an irresistible passion in a reasonable person constitutes manslaughter; and that involuntary manslaughter may consist in the taking of a human life without any intent so to do in the commission of a lawful act without due caution or circumspection.

The information charged murder in the first degree, and therefore, included all the lower grades of criminal homicide. If there was no evidence upon which a verdict of manslaughter could be based, then the trial court was justified in instructing the jury to that effect. On the other hand, if there was evidence relevant to the issue of manslaughter, its credibility and force were for the jury to consider in determining the facts, and not as a matter of law for the decision of the court.—*Crawford v. People,* 12 Colo. 290; *Stevenson v. United States,* 162 U. S. 313.

So that, whether it was proper to withdraw from the jury the question of the guilt of the defendant of any particu-

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lar grade of the offense included in the information, must be answered by considering whether there was any evidence tending to establish such grade.—*Allison v. State,* 86 S. W. (Ark.) 409.

The evidence shows without question that immediately preceding the shooting the defendant and Von Phul were engaged in a conversation in a public bar-room, where many were present; that Von Phul knocked defendant down with his fist by a blow so violent that defendant struck the floor with great force, his head striking "hard," and that as defendant raised up he drew a revolver and commenced firing at Von Phul. This statement of what occurred shows circumstances tending to excite a "sudden heat of passion." Whether they amounted to the statutory "provocation" and were sufficient to cause passion on the part of the defendant which the statute denominates "irresistible," was not for the court to determine, either as a question of law or of fact, but one of fact for the jury to determine from the evidence in the case. The defendant claimed to have fired the shots at Von Phul with the intention of striking him for the purpose of protecting his life. If the facts justified him in so doing, his action in this respect would be lawful; but if he did so without due caution or circumspection, taking into consideration the presence of others in the bar-room, he was not guiltless, but might be adjudged guilty of involuntary manslaughter in causing the death of Copeland; but with the question of manslaughter taken from the jury, there was nothing left for them to do but to find him guilty of murder, when they found, as they evidently did, that defendant was not justified in firing the shots in self-defense, thus depriving them of their exclusive province to determine the grade of the offense from the evidence in the case, notwithstanding that there was evidence upon which a verdict of manslaughter might have been based.

We do not mean to intimate what the verdict should have been, but as there was not an entire absence of evidence

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tending to establish the crime of manslaughter, it was error for the court to take that question from the jury by instructing them "that there is no manslaughter in this case."

Counsel for the prosecution insist that it was not error to so instruct, for the reason the defendant stated that at the time he shot at Von Phul he had no feeling of either passion or revenge. An examination of the record convinces us that what the defendant meant by this statement was, that he had no feeling of passion or revenge when he purchased the revolver, and was not referring to the time when he fired the shots at Von Phul. It is also contended on behalf of the people, that as the defendant testified he shot to protect his life, manslaughter was not involved. In other words, the contention is, that defendant, having claimed that he acted in self-defense, he is precluded from asserting that the shooting was done under circumstances which reduce the homicide to manslaughter. In the circumstances of this case, we do not regard this contention as tenable, as there was evidence tending to prove that the homicide was manslaughter.

In *Stevenson v. U. S., supra,* the testimony tended to establish that the deceased, by his conduct, had provoked passion on the part of the defendant, and also that the latter had acted in self-defense. There, as here, it was urged that the two defenses were incompatible. On that subject the court said (at page 322):

"It is objected that while the evidence above set forth was proper to be submitted to the jury upon the issue of self-defense, it was not of that character to even raise an issue as to the grade of the crime, if the theory of self-defense were not sustained. We do not see the force of the objection. The fact that the evidence might raise an issue as to whether any crime at all was committed is not in the least inconsistent with a claim that it also raised an issue as to whether or not the plaintiff in error was guilty of manslaughter, instead of murder. It might be argued to the jury under both aspects, as an act of self-defense and also as one resulting from a sudden

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passion, and without malice. The jury might reject the theory of self-defense as they might say the shot from the pistol of the deceased had already been fired, and the plaintiff in error had not been harmed, and therefore firing back was unnecessary and was not an act of self-defense. But why should the other issue be taken from the jury, and they not be permitted to pass upon it as a question of fact."

As there was testimony tending to prove that defendant acted under the influence of passion provoked by Von Phul, and that he also acted in self-defense, we think the rule announced in *Kent v. People,* 8 Colo. 563, applicable, which is to the effect that the defendant was entitled to have the entire *res gestae* laid before the jury, to be considered as a whole, without distinction as to which party introduced the several matters of evidence.

In this connection the *Crawford* case, *supra,* is instructive. In that case chief justice Helm, after stating what had occurred between the deceased, his father, who was with him, and the defendant, from which it appeared there was an affray between the parties, stated what then occurred as follows:

"That in the confusion and excitement, and further incensed by these additional epithets, defendant took a small shotgun loaded with a single charge of fine shot, and went to the door, not designing, as he asserts, to take the life of Pratt, but with a view of defending himself and protecting his premises. The gun was, however, discharged, and the son was unintentionally killed."

The trial court had refused to instruct on manslaughter. In the opinion, the learned chief justice, after enumerating instances when it would be proper to withdraw from the consideration of the jury the question of the grades of manslaughter, said:

"But where there is an affray, and where self-defense is a defense relied on, the court exercises an exceedingly dangerous prerogative in refusing to charge upon the minor, as

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well as the graver, offenses covered by the indictment. * * * By statute the accused in criminal cases is permitted to become a witness, and when once upon the stand, all the ordinary rules of evidence apply to him. He is subject to cross-examination; his testimony may be impeached; the circumstances under which he testifies may be considered; and perjury on his part can be as readily disclosed as in the case of other witnesses. The jury are to give his testimony such credit and such weight as, in their judgment, shall, under all the circumstances, be proper. They may accept it as true, or they may reject it as false. * * * The evidence shows without question that at the time of the homicide there was a quarrel between defendant and Gideon Pratt, followed by an affray, during which violent, profane and angry words were used by both parties, and in which they engaged in a physical rencounter of considerable duration, grappling and exchanging blows. The firing of the fatal shot grew out of this affray, and was directly connected with, and a part of it. There were circumstances tending to excite a "sudden heat of passion." Whether such circumstances amounted to the statutory "provocation" or caused the passion which the statute denominates "irresistible," was not for the court to determine."

It is also urged by the prosecution that if there was a preconceived designed on the part of the defendant to kill Von Phul, the homicide was murder, notwithstanding the fact that there was provocation. This contention is based upon the fact that defendant had purchased a revolver after the difficulty in Von Phul's room, and the testimony to the effect that defendant had threatened to kill Von Puhl. We cannot determine as a fact that defendant sought Von Phul in the barroom with the intention of taking his life. The defendant did buy a revolver the day preceding the shooting. He says he bought it for his protection. There was evidence on the part of the people that he had threatened to kill Von Phul. This the defendant denied, so that whether he sought out

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Von Phul for the purpose of taking his life, and pursuant to a preconceived design to do so, shot him, or whether he spoke to him without such design, and the shooting was the result of such a degree of passion caused by a provocation on the part of Von Phul as would reduce the homicide to manslaughter, were questions for the jury to determine, and neither the trial court nor this court can invade that province.

Counsel for the people cite many cases wherein it is held that the trial court did not err in taking the question of manslaughter from the jury. It can serve no useful purpose to review them. They are all based on the principle that when there is no evidence to establish manslaughter it is not error to take that question from the jury, and point out from the testimony in each of the cases, that such was the fact. This constitutes the distinguishing feature between these cases and the one at bar. All authorities, both text writers and reported cases, uniformly hold that where there is testimony tending to prove manslaughter, it is error to refuse to instruct the jury on that offense, or by an instruction, to take that question from them, for the reason, as held in the *Stevenson* case, *supra,* (quoting from the syllabus):

"On the trial of a person indicted for murder, although the evidence may appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter, or an act performed in self-defense, yet, so long as there is evidence relevant to the issue of manslaughter, its credibility and force are for the jury, and cannot be matter of law for the decision of the court."

In *Rutherford v. The State,* 16 Texas Court of Appeals 649, the case had once been before that court, and reversed for the reason that the trial court had refused to give an instruction on manslaughter. At the second trial the trial judge again refused to instruct on this subject. In reviewing the case a second time, the appellate court said:

"We still think that a charge upon the law of manslaughter is demanded by the evidence. We have never held,

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as the learned judge seems to think we have, that the evidence would justify a verdict for manslaughter. It was not, and it is not, our province to determine that question when considering the law of the case, nor was, or is it, the province of the trial judge to determine that question when instructing the jury. That was a question exclusively for the jury to decide. His idea seems to be that if the evidence, in his opinion, would not justify a verdict of manslaughter, then he ought not to charge the law of that offense. Such is not the rule of the law. If there is evidence in the case tending to raise the issue of manslaughter, it is the duty of the trial judge to charge the law of that offense, regardless of his own opinion as to whether or not such evidence would justify a conviction for said offense. It is the business of the jury, and not the court, to pass upon the sufficiency of the evidence. Our constitution and laws guarantee a citizen charged with felony the right of trial by jury, and it is made the duty of the jury, and not of the judge, to pass upon the credibility of the witnesses and determine the weight of the testimony. * * * When the judge assumes the power of determining the sufficiency of the evidence to support an issue presented by it, and refuses to charge the law relating to that issue, he invades the exclusive province of the jury, and denies to the citizen on trial the full benefit of the trial by jury, and thus deprives him of a trial by due course of the law of the land."

The results of the affray between Von Phul and the defendant are deplorable in the extreme, but this did not deprive the defendant of the right to have his guilt or innocence determined by a jury according to the law of the land. The constitution and laws of the state provide for the trial of a person charged with murder by a jury. They, and they alone, must determine the facts, and no court, either trial or appellate, has a right to constitute itself a trier of facts, and thus invade the province of a jury. No matter how lightly the court may regard the testimony offered on behalf of the defense, the question of its weight and the credibility of the

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witnesses is to be determined by the jury, properly instructed as to the law. Unless this course is followed, a defendant is deprived of his constitutional right of a trial by jury. It is manifest there was testimony tending to prove manslaughter. Whether or not is was sufficient to justify a verdict of that character was for the jury to determine, and not the court. By advising the jury that there was no manslaughter in the case, the trial judge deprived the defendant of his unquestioned right guaranteed by the fundamental and statutory law of the state, to have a jury determine the grade of the offense for which he was on trial.

The judgment of the district court is reversed, and the cause remanded for a new trial.

*Reversed and Remanded.*

Decision *en banc.*

Mr. JUSTICE SCOTT not participating.

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[No. 7739.]

## LOTH v. LOTH'S ESTATE.

DIVORCE—***Foreign Marriage within the Year***—**A woman residing in Colorado is divorced, the decree expressly prohibiting re-marriage within a year, save to the divorced husband. Within the year she resorts to the territory of New Mexico and is there united in marriage with a citizen of Colorado, not the former husband. The marriage being lawful in New Mexico, is lawful in Colorado.**

*Error to Denver County Court.*—Hon. JOHN R. DIXON, Judge.

Mr. PAUL DE LANEY and Mr. JAMES A. HARRIS, for plaintiff in error.

Mr. ROBERT H. KANE, for defendant in error.

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Mr. JUSTICE HILL delivered the opinion of the court:

Carl L. Loth departed this life at the city and county of Denver about September the 1st, 1911; he was possessed of certain real and personal property situate in said county. Upon September 18th following, Alice G. Loth filed her petition in the county court setting forth the matters above stated, with the further facts that she was his wife and sole and only heir at law, upon account of which she prayed that letters of administration be granted to her. This petition was resisted by a sister of the deceased, under the claim that the petitioner was not the widow of the deceased, that she was never legally married to him. The court denied the petition of the alleged wife and appointed Henry B. Teller as administrator. The wife brings the case here for review upon error.

If the plaintiff in error was the lawful wife of the deceased (no other objection having been presented), it is agreed that she was entitled to the appointment; if not, the order of the court was correct. The record discloses, that the plaintiff in error was formerly the wife of Daniel B. Hayne; that on June 16th, 1911, while she was a resident of Denver, she was granted a decree of divorce from Hayne by the county court of said county; that no application has ever been made to set the decree aside. This decree is absolute in form, and is not shown to be irregular or void. It contains the usual clause concerning re-marriage within a year, as follows, "That until the expiration of the full period of one year from after the day of the date hereof, neither of said parties be permitted to re-marry to any other person." Thereafter, upon July 21st following, the plaintiff in error and Carl L. Loth, since deceased, (while both were residents of Colorado) at the county of San Juan in the territory of New Mexico, secured a marriage license, and were married in full conformity with the laws of that territory. The sole question necessary for determination is the validity of the marriage contract entered into in New Mexico within one year from the date of

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the decree of divorce dissolving the bonds of matrimony theretofore existing between the plaintiff in error and her first husband. Its determination depends upon the construction of section 2122, Revised Statutes of 1908, and its effect upon marriage contracts in another state (recognized as valid there) when considered in connection with section 4165 of said statutes.

This identical question was recently passed upon by our court of appeals in case No. 3591, *Adam H. Griswold v. Hattie E. Griswold,* wherein for the reasons stated it was held that such a marriage was valid in this state. We have given that opinion careful consideration and have reached the conclusion that it states the correct rule upon the subject; we add our approval thereto; the reasoning and conclusion are applicable here. We think it unnecessary to add anything to the reasons given; they cover the question in its entirety. It follows that the marriage contract solemnized in New Mexico is valid, in this state upon account of which plaintiff in error was the lawful wife of the deceased at the time of his death and should have been appointed administratrix of his estate.

The judgment is reversed and the cause remanded with instructions that the former administrator be discharged and that the plaintiff in error be appointed administratrix of said estate. *Reversed.*

Decision *en banc.*

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[No. 7981.]

## CITY AND COUNTY OF DENVER v. PITCHER.

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[No. 7982.]

## THE COLORADO TAX COMMISSION v. PITCHER.

1. TAXATION—*The Purpose of the Provisions of the Constitution and Statute Regulating the Assessment of Property*, is to secure uniformity of taxation in each county of the state, for county purposes, and enable the commissioners in each county to determine the rate of tax necessary to meet the expenses of the county for the ensuing fiscal year. The provisions of the charter of the city and county of Denver, regulating the same matters, were enacted with a like purpose.

2. ——*Assessment Roll—When Complete*—The assessor may, at any time before the meeting of the county board of equalization, correct the assessment of any exempt property, the double assessment of the property of any tax-payer, or the assessment to a tax-payer of property of which he was not the owner at the time of the assessment, or any excessive assessment. He may also at any time before the return of the roll to the treasurer, supply clerical omissions and correct clerical errors in the roll, where it can be ascertained therefrom what was intended. He may supply such omissions as come to the notice of the county commissioners of his county, or, in Denver, those to which his attention is directed by the board of supervisors acting as a board of equalization. But where he has delivered to the auditor of state the abstract of the assessment roll required by Rev. Stat., sec. 5659, the roll is deemed complete, and thereafter the assessor may make only those changes which are expressly authorized by the statute.

A horizontal reduction in the assessment thereafter attempted, is without authority of law.

3. INJUNCTION—*Against Public Officer*—If a public officer is transcending his authority, and the resulting injury is not susceptible of reparation by proceedings at law, he may be restrained by injunction.

An injunction awarded to restrain an assessor from making an unlawful reduction in the assessment roll after its completion.

The provisions of Rev. Stat., sec. 5636, were held to be without application.

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*Error to Denver District Court.*—Hon. GREELEY W. WHITFORD, Judge.

Mr. W. H. BRYANT, Mr. J. A. MARSH and Mr. PAUL KNOWLES, for the city and county of Denver.

Hon. FRED FARRAR, attorney general, Mr. FRANK C. WEST, assistant attorney general, Mr. NORTON MONTGOMERY, assistant attorney general, and Mr. PHILIP W. MOTHERSILL, for the Colorado tax commission.

Mr. FRED W. PARKS, attorney for defendant in error.

The defendant in error in each of these cases is the assessor of the city and county of Denver. He was engaged in making a horizontal reduction of ten per cent. on the valuations of property theretofore assessed, valued and listed by him for the year 1912, and extending the tax roll accordingly, when each of the plaintiffs in error brought an action to restrain him from so doing, and for such other, further and general relief as to the court should seem meet and proper in the premises. In the case of the city and county of Denver an *ex parte* restraining order was issued by the district court. The defendant filed a general and special demurrer in each suit, which was sustained, and the restraining order in the one case dissolved, and denied in the other. Thereupon, the plaintiffs in each case stood upon their respective complaints, and their actions were dismissed. The plaintiffs have brought their respective actions here for review on error, and severally ask for a restraining order against the assessor until the causes can be determined on their merits. Both parties appeared at the oral argument, and stipulated that the arguments on the application for the restraining orders asked for by the plaintiffs should be treated as arguments on the merits, and that the causes should stand submitted for final determination. As the causes present practically the same questions, they will be disposed of in one opinion.

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On behalf of the city and county of Denver the complaint filed in the court below alleged, in substance: That the plaintiff is, and at all times mentioned, was, a municipal corporation, existing by virtue of the constitution and laws of the state of Colorado; that the defendant is, and at all times since June first, 1912, has been, the duly elected, qualified and acting assessor of the city and county of Denver, and has at all times since that date had, and now has, the actual possession, custody and control of the office of the assessor, and of all books, records, matters and things pertaining to that office; that, pursuant to law, and prior to August 1st, 1912, he made and caused to be made an assessment of the real and personal property within the city and county of Denver, and thereafter, and on or about the first Tuesday in August, 1912, met with the assessors of the different counties of the state, as provided by law, and compared his assessment with the assessments of the property in other counties of the state, and after such comparison, did not change or correct his assessment, as theretofore made; that he made an assessment roll of the property in the city and county of Denver, and on or about August 30th, 1912, produced an abstract of his assessment roll and subscribed and swore thereto, at the city of Boulder, in the presence of the auditor of state, which assessment roll showed a total valuation of the property within the city and county of Denver, subject to assessment, in the sum of $133,835,120.00; that after the authentication of such assessment roll, the auditor of state presented it to the state board of equalization, and to the Colorado tax commission, and thereafter, and prior to October 1st, 1912, the state board of equalization held a meeting for the purpose of adjusting and equalizing the valuation of real and personal property among the several counties of the state; that at this meeting no objection or complaint was made by the defendant, or any one, to the assessment made by the defendant, as verified before the auditor of state; that the Colorado tax commission, after the presentation to it of such assessment roll, held vari-

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ous meetings for the purpose of examining the assessment of the real and personal property in the several counties, as made by the respective assessors, and certified the same to the state auditor, as provided by law; that neither the board of equalization nor the tax commission made any change or correction in the assessment made by the defendant, nor requested him to make any change or correction; that during the month of September, 1912, the board of supervisors of the city and county of Denver sat as a board of equalization; that at such meetings only two complaints upon petition were presented to the board of equalization with respect to the assessment made by defendant, which, after a hearing, were denied; that after the assessment roll for the year 1912 prepared by defendant was ready for the extension of taxes, he certified the total amount of property assessed within the limits of the city and county of Denver to the city council, showing the assessment so made by him, and also the assessment upon the property of telegraph, telephone and railroad companies, as certified to him by the tax commission, and that thereafter the council passed an ordinance, levying taxes on all taxable property within the limits of the city and county of Denver for the year 1912, which was duly and regularly passed, and signed and approved by the mayor; that at various times subsequent to the acceptance by the state board of equalization and Colorado tax commission of the assessment of real and personal property, made by defendant, and prior to December 20, 1912, the auditor of state and state treasurer issued warrants in payment of appropriations theretofore made by the general assembly, which warrants were based upon, and in anticipation of, the revenues to be derived from taxes collected upon property within the city and county of Denver, in accordance with the assessment made by the defendant; that on December 2, 1912, the mayor of the city and county of Denver presented to the council what is known as the "mayor's budget" for the year 1913, which budget was based upon the revenue to be derived from taxes collected in accordance with the assess-

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ment so made by defendant, and the appropriation ordinance for the city and county of Denver during the year 1913; that on or about the 20th day of December, 1912, the defendant wrote to the auditor of state a letter, notifying him that he desired to withdraw the assessment theretofore made by him, and that he had concluded to make a horizontal reduction of ten per cent. of all assessments under his jurisdiction, and notified the auditor that the assessed valuation of the property within the city and county of Denver for the year 1912 would be reduced ten per cent., and would stand at, approximately, $121,709,835.00; that at about the same time the defendant notified the mayor of the city and county of Denver of his proposed horizontal reduction on the assessment of property within his jurisdiction; that defendant has not delivered to the treasurer of the city and county of Denver the tax list and warrant under his hand and official seal, setting forth the assessment roll, with the taxes extended, and is proceeding to prepare a tax list and warrant, setting forth the valuation arrived at by a horizontal reduction of ten per cent. from the valuation and assessment made and certified by the defendant to the auditor of state and city council.

The complaint then charged that certifying and delivering to the treasurer the tax list and assessment roll and warrant prepared in accordance with the proposed horizontal reduction of assessments will subject the government of the city and county of Denver and that of the state to great embarrassment and difficulties; would create unutterable confusion in the administration of the financial department of these governments in the collection of taxes, and will cause delay in such collection, and that, as plaintiff is informed and believes, the assessor, through persons acting under his direction and control, has for some time past been working in making the horizontal reduction of ten per cent., and extending taxes based thereon, to the end that the tax list and warrant for the collection of taxes may be delivered by him to the treasurer of the city and county of Denver before any order of court.

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commanding him to desist therefrom, can be applied for and secured.

The complaint on behalf of the Colorado tax commission, after alleging that it is created by the laws of the state, and is authorized to bring in its own name such suits as are necessary to enforce all laws of the state for the assessment, levying and collection of taxes, alleges substantially the matters set up in the complaint of the city and county of Denver.

To each of these complaints the defendant filed a special demurrer based upon the ground that the court was without jurisdiction of the subject matter of the action, in that the statutes provide a method of procedure for the hearing and trial of the questions set up in the complaint, and that no showing is made that the plaintiff has or has not availed itself of these statutory provisions; that the defendant is a public officer of the city and county of Denver and state of Colorado, and that the acts which the plaintiff is seeking to enjoin him from performing are acts required of him by the statutes of the state; and that the defendant is a constitutional and state officer, performing duties of a *quasi* judicial nature, and the effect of the relief sought is to control him in the exercise of his official functions of a governmental and executory nature, and prevent him from exercising his discretion and judgment in the matter of assessment. The defendant also demurred upon the ground that the respective complaints did not state facts sufficient to constitute a cause of action.

In this court each plaintiff has filed what is denominated a petition for a temporary injunction or restraining order. To these petitions the defendant has answered, and also demurred, and the respective plaintiffs have demurred to the answer. We do not deem it necessary to give a synopsis of these pleadings, as the case must be determined on the pleadings presented to the trial court, and not on new pleadings filed here. In determining the questions presented, it is necessary to consider the following constitutional, statutory and charter provisions:

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"There shall be elected in each county, at the same time at which members of the general assembly are elected, commencing in the year 1904 * * * one county assessor * * *." Art. XIV, sec. 8, constitution.

"All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal * * *." Art. X, sec. 3 *ibid.*

"On the first day of January in each year, or as soon thereafter as practicable, the assessor or his deputy shall call upon each inhabitant of his county, at the residence or place of business of such inhabitant, and deliver or leave for him or her the proper blanks for the return of the property of such inhabitant for assessment * * *. Every such inhabitant shall make and deliver to the assessor, between the first day of April and the 20th day of May in each year a full and correct schedule and description upon the blanks furnished as aforesaid of all the personal property of which such person was the owner on the first day of April of the current year * * *."

"In every such schedule and description the person making the same shall set down the full cash value of each item of the property therein mentioned for the guidance of the assessor. But the assessor shall determine for himself the value of each item after an examination of the schedule. * * ." Sec. 5573, R. S., 1908.

"At the hour of ten o'clock A. M. on the first Tuesday in August in each year, all the county assessors of this state shall meet at the capitol, and the auditor of state shall provide a place for them to meet, where they may have opportunity to compare their assessments before making affidavit thereto, and if, upon such comparison, and from other information obtainable, any assessor is satisfied that his valuation of any class of property is too high or too low, and that it does not

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correctly set forth the proper value thereof, it shall be his duty to correct the same and thereafter make affidavit thereto, as is required by section 84 of this act. * * *." Section 5633 *ibid.*

"The assessor of each county of the state, except assessors of counties having more than one hundred thousand population, upon the completion of the assessment toll in each year, and prior to the endorsement of the tax list and warrant thereon, and on or before September first of each year, shall produce the abstract of the same in person, and not by deputy, to the auditor of state, and he shall there, in the presence of the auditor, subscribe his name to the following statement, which shall be appended to said assessment roll and constitute a part thereof, to-wit:

State of Colorado, County of .....ss.

I, ....., the assessor of ..... county, Colorado, do solemnly swear that in the above and foregoing assessment roll I have assessed all the taxable property in the county ..... for the current year and at the true value thereof.

.....

Subscribed and sworn to before me this ..... day of ....., A. D. 19....

.....

Auditor of State.

The assessor so subscribing the statement aforesaid shall thereupon be sworn to the truth of the facts set forth in said statement by the auditor. The auditor is authorized to administer the oath to said assessor, so subscribing said statement. * * * *." Sec. 5628 *ibid.*

Immediately after the assessment is completed, and the affidavit provided for in section 84 hereof (sec. 5628, *supra,*) is subscribed by the assessor and sworn to before the auditor of state, the county assessor shall make out an abstract thereof stating in detail the following facts with reference to the assessment in his county: (Then follow directions as to what

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such details shall exhibit, which are to the effect that the assessor shall state in such abstract the amount, kind and value of the property possessed in his county, and provides:) The said abstract the county assessor shall make out in duplicate, and transmit one copy forthwith to the auditor of state. The state board of equalization is authorized to diminish or add to the above list and to require such different or further matters to be returned as it may deem advisable." Sec. 5659 *ibid.*

"The auditor of state, upon receipt of the abstract of assessment from any assessor, shall, without delay, examine the same, and if found to be correct, shall send the assessor a certificate stating the fact therein." Sec. 5662 *ibid.*

"The state board of equalization shall sit on the first Monday of October in each year, at the executive office, for the purpose of examining, adjusting and equalizing the assessments in the several counties of the state." Sec. 5764 *ibid.*

"If, in the opinion of the state board of equalization, upon satisfactory information submitted, any county assessor has omitted taxable property in his county from the abstract of assessment, or has assessed the property of his county palpably and manifestly below its true value, or has failed to verify his return, as herein required, and if said state board of equalization is likewise of the opinion that such delinquency operates as a fraud upon the state revenues, and that such revenues will be seriously impaired thereby, then and in such case the state board of equalization shall, upon reasonable notice to the assessor, and after summary hearing, require the delinquent assessor to forthwith make such corrections and additions to the said assessment as will make the same in accordance with the statutes * * * provided that in such case, before any such corrections or additions to said assessment shall be required, if desired by the assessor, he may have an appeal from the decision of the state board of equalization to the district court of the county of which he is the assessor. * * *." Sec. 5636 *ibid.*

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"Immediately upon the receipt by the assessor of each county of the statement of changes in the assessment of his county made by the state board of equalization, he shall immediately make such correction of the assessment and assessment roll as may be necessary to carry out the directions of the state board of equalization." Sec. 5664 *ibid.*

"On or before the third Monday of October in each year the board shall complete the equalization, and the state auditor shall transmit to the clerk of each county a statement of the changes, if any, which have been made in the assessment, and the rate of tax which is to be levied and collected within his county, which shall not exceed the limit permitted by the constitution; * * * and the assessor of each county, in making up the tax list, shall compute and carry out in the proper column, a state tax at the rate aforesaid * * *." Sec. 5767 *ibid.*

"On the first day of the meeting of the county commissioners of each county as a board of equalization, the county assessor shall submit to said board the complete assessment of his county, together with a list of property returned to him. * * *." Sec. 5658 *ibid.*

"The county commissioners of each county shall constitute a board of equalization for the adjustment and equalization of the assessment among the several taxpayers of their respective counties. Said board shall hold two regular meetings in each year, at the office of the county clerk, at the county seat, at follows, viz.: Commencing on the first Tuesday in September and continuing not less than three, nor more than ten consecutive days, and on the third Tuesday of September, and continuing not less than two nor more then ten consecutive days. The board shall notify the assessor to supply any omissions in the assessment roll which may come to their notice. In case any material changes are made or directed by said board in the assessment of any person or persons at said first meeting, the county clerk shall, as soon as may be, after the close of said meeting, mail to each of

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said persons, prepaying the postage thereon, a notice of such change * * *. The board shall, at its second meeting, sit to hear complaints only from those dissatisfied with said changes, and to adjust the assessment so as to equalize the same among the several taxpayers of the county * * *." Sec. 5761 *ibid.*

"Except as an incident of equalization, the county board of equalization shall have no power whatever to make any increase or decrease in the total amount of the valuation of the property of the county as set forth in the assessment roll. The power of said board shall be to adjust and equalize the valuation of the property set forth in the assessment roll, and shall exercise no other power, and shall have no other authority in the premises." Sec. 5638 *ibid.*

"If, in the opinion of any taxpayer, his property has been twice assessed, or if the property exempt from taxation has been assessed, or if personal property has been assessed of which said person was not possessed at the time of the assessment, or if any property has been assessed too high, or if any property has been otherwise illegally assessed, such person having such grievance may appear before the assessor and make known to the assessor the facts in the premises, and if in any particular the assessment complained of is erroneous under the statutes, the assessor shall correct the same. * * * The assessor shall continue such hearing from day to day and time to time until all grievances shall be heard, but all hearings shall be concluded before the day of the first meeting of the county board of equalization." Sec. 5639 *ibid.*

"Omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment roll to the treasurer, or by the treasurer at any time before the receipt of the said roll. * * *." Sec. 5722 *ibid.*

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By section 124, *ibid*, the board of county commissioners is empowered to order the levying of taxes, as provided by law.

"On the first Monday of November in each year the board of county commissioners shall, by an order to be entered of record among their proceedings, levy the requisite tax for the year for school and other county purposes, as required by law, and the same may be levied at any time prior to the first Monday of November, if the statement of the rate of tax to be levied for state purposes has been received from the auditor. * * *." Sec. 5760 *ibid.*

"The fiscal year of each county in the state of Colorado shall commence on the first day of January in each year. The board of county commissioners of each county in this state shall, within the last quarter of each fiscal year, and at the same time that the annual levy of taxes is made, pass a resolution, to be termed the annual appropriation resolution, for the next fiscal year, in which said board shall appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such county for the next fiscal year, and any such resolution shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriation shall be made at any other time within such fiscal year, nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year." Sec. 1215 *ibid.*

"As soon as practicable after the taxes are levied and not later than the first day of January annually, every county assessor shall deliver to the county treasurer the tax list and warrant under his hand and official seal, setting forth the assessment roll, with the taxes extended, containing in tabular form and alphabetical order the names of the persons and bodies in whose names property has been listed in his county, with the several species of property, and the value, and the total amount of taxes, and with the column of numbers and

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value footed, and commanding the treasurer to collect said tax, and in a column to be provided for that purpose, he shall write the words, "By the assessor," when the list was made by himself." Sec. 5666 *ibid.*

In the case of the city, the following charter provisions of the city and county of Denver are to be considered:

"The assessor shall assess all taxable property within the city and county at the time, and in the manner prescribed by the General Laws of the state. * * *." Sec. 46.

"Except as otherwise herein provided, the officers who shall respectively perform the acts and duties required of county officers to be done by the constitution and General Laws in all cases not specifically provided for, so far as applicable, shall be as follows: * * * The board of supervisors shall act as a board of equalization, and perform the acts and duties required of a board of county commissioners when sitting as a board of equalization; the assessor, the acts and duties required of county assessor; * * *." Sec. 156.

By section 213 it is made the duty of the assessor, as soon as the assessment roll is ready in each year for the extension of taxes, in accordance with the General Law, to certify the total amount of property assessed within the limits of the city and county to the council, whereupon it is made the duty of the council to proceed to make the proper levy upon such valuation to meet the expenses of the municipality, and at the same time cause the total levies, including school, state and special levies, to be certified by the clerk to the assessor, who shall then extend the same upon the tax list of the current year.

By section 212 the council is directed to levy a tax not in excess of a specified rate for all general, state and county purposes, upon the total assessed valuation of the property within the state, and shall, also, in addition, levy the state and school district tax. "The fiscal year of the city and

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county shall commence on the first day of January and end on the last day of December of each year." Sec. 211.

By section 217 the mayor is required on or before the first day of December in each year, to present to the council a detailed statement of the amount necessary to defray the expenses of the city and county government and each department thereof, for the ensuing fiscal year, and also the amount to be raised by taxation to pay interest on bonded indebtedness and to provide for sinking funds.

By section 218 the council shall meet in joint session annually between the first and third Monday in December, and make a budget of the estimated amounts required to pay the expenses of conducting the public business of the city for the next ensuing fiscal year, based upon the mayor's budget, and for the other purposes required by the charter. After this estimate is made, section 219 requires that it shall be signed by the mayor and clerk, and filed in the office of the auditor, and that appropriations shall then be made by ordinance for the ensuing fiscal year, to the several purposes and departments therein named.

"The council shall not order the payment of money for any purpose whatsoever, nor shall any warrant or other evidence of indebtedness issue, in excess of the amount appropriated for the current year, and at the time of said order remaining unexpended in the appropriation of the particular class or department to which such expenditures belong; nor shall any liability or indebtedness incurred in any one fiscal year be a charge upon or paid out of the income or revenue of any other fiscal year." Sec. 246.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The main contention on the part of the respective plaintiffs in error is, that the defendant, in making the ten per cent. horizontal reduction, is committing an act which the statutory provisions prescribing his duties do not authorize, and that in so doing he is acting directly contrary to such provisions;

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while on the part of the defendant the claim is made that he is performing an act of a governmental and executive nature, which the courts are without authority to control. Which of these contentions is correct turns upon the consideration of the constitutional, statutory and charter provisions above quoted, or to which reference has been made, and applicable to the facts stated in the complaints.

An assessor is a constitutional officer, but his duties are prescribed by statutes, which provide that he shall list and value property in his county for the purpose of taxation. The statutes evidently contemplate that this shall be completed before the first Tuesday in August of each year, as on that date all county assessors are required to meet at the state capitol for the purpose of comparing their assessments before making affidavit thereto, when, if any assessor is satisfied that the value of any class of property in his county is too high or too low, it is made his duty to correct the same. When such correction is made, if necessary, or if it is found a correction is not required, then the assessment roll is considered completed, for we find the next step required is that when the assessment roll is completed, each assessor, on or before the first day of September in each year, shall make an affidavit thereto before the state auditor, to the effect that in such roll he has assessed all the taxable property in his county at its true value. Immediately thereafter, each assessor is required to make in duplicate an abstract of the assessment in his county, showing the amount, kind and value of the property therein assessed, one copy of which shall forthwith be transmitted to the auditor of state. The state board of equalization is required to convene on the first Monday in October, in each year, for the purpose of examining, adjusting and equalizing the assessments in the several counties, which it does by an examination and comparison of the abstracts furnished by the county assessors. If, from such examination, or from any other source, the board is satisfied that taxable property in any county has been omitted, or property assessed too low, then the board, upon

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reasonable notice to the delinquent assessor, may require him to forthwith make such corrections as will make the assessments in his county conform to the statutes, and unless the assessor so directed desires to appeal from such order, he shall at once make the corrections necessary to comply with the directions of the state board of equalization.

In its logical order, the next, and final, act of the state board of equalization consists in a compliance with the statute which requires this board, on or before the third Monday of October, in each year, to transmit to the clerk of each county a statement, which, among other things, shall state the rate of tax to be levied in each county for state purposes. This statute makes it the duty of the assessor of each county, in making up the tax list, to compute and carry out, in the proper column, a state tax at the rate certified by the board. The evident purpose of the statutory provisions so far considered is two-fold: First, to secure a uniform valuation of property in the state upon which to levy a tax for state purposes in compliance with the constitution, which requires that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax; and next, to furnish the state authorities with the total assessed valuation of the taxable property in the state, so they may be advised as to what tax rate is necessary in order to raise sufficient revenue for state purposes.

In 1911 (Session Laws of that year, p. 612 *et seq.*), the general assembly passed an act entitled "Tax Commission," but, so far as advised from the briefs of counsel, no changes were made affecting any question involved in this case, although, the tax commission is now vested with some of the powers formerly possessed and exercised by the state board of equalization. They do not appear to be antagonistic to any of the sections which we have quoted, or to which we have referred, but are merely additional, or impose upon the commission some of the duties which the state board of equalization was theretofore required to perform; but, as stated, our

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attention has not been directed to any of the provisions of the act which could in any manner affect the cases under consideration, except that by sections 13, 15 and 36 general supervision over the administration of assessing officers is conferred upon the commission, and to this end, the commission is empowered to enforce all laws for the assessment, levying and collecting of taxes, and may cause to be instituted such proceedings as will remedy improper or negligent administration of the tax laws of the state, and may compel compliance with the provisions of the act and with the orders of the commission by proceedings in mandamus, injunction, or other proper civil remedies.

We now come to the duties and functions of the assessor and county commissioners of each county, in connection with the assessment and the levy of taxes. The statute makes it the duty of the assessor to submit to the county commissioners of his county, on the first day they meet as a board of equalization, the complete assessment of his county. These officials constitute the county board of equalization for the purpose of equalizing and adjusting assessments among the taxpayers of their respective counties. They are required to hold two meetings each year, one commencing on the first Tuesday in September, and the other on the third Tuesday of the same month. By reference to the time when each assessor is required to transmit the auditor of state an abstract of the assessment in his county, it will be seen that the assessor is required to submit his assessment to the county commissioners of his county at substantially the same time. This board shall require the assessor to supply any omissions in the assessment roll which may come to their notice, but except as an incident of equalization, they have no authority to make any increase or decrease of the total valuation of the property of the county, as exhibited by the assessment roll furnished them by the assessor.

The fiscal year of each county commences on the first day of January of each year. It is the duty of the board of

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county commissioners, and within the last quarter of each fiscal year, and at the same time the annual tax levy is made, to pass what is termed the annual appropriation resolution for the next fiscal year, by which there shall be appropriated such sums as may be deemed necessary to meet and defray the necessary expenses and liabilities of the county for the next fiscal year. This resolution shall specify the object for which the appropriations are made, the amount appropriated for each purpose, and further appropriations at any other time within such fiscal year are expressly inhibited. The board is authorized to levy taxes, and this authority may be exercised on the first Monday in November in each year by the levy of the requisite tax for school and other county purposes, or earlier, if the rate of tax to be levied for state purposes has been received from the auditor. The purpose of these provisions is to secure a uniformity of taxation in each county for county purposes, and also to enable the commissioners in each county to determine what rate of tax is necessary to meet the county expenses for the ensuing fiscal year. As soon as practicable after the taxes have been levied by the commissioners, and not later than January first, each year, it is made the duty of the assessor to extend the taxes on the assessment roll, and deliver the same to the county treasurer. By the charter provisions of the city and county of Denver, the board of supervisors are required to perform the acts and duties by boards of county commissioners, as a board of equalization, and the assessor, the acts and duties of a county assessor. It is also made the duty of the assessor, as soon as the assessment roll is ready in each year, for the extension of taxes, in accordance with the general law, to certify the total value of the property assessed within the limits of the city and county of Denver to the city council. The fiscal year of the city and county begins on the first day of January, and ends December 31st, each year. The mayor is required, on or before the first day of December, each year, to present to the city council a detailed statement of the amount necessary to defray the expenses of

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the city and county government for the ensuing fiscal year; and also, the amount necessary to raise, by taxation, with which to pay interest on bonded indebtedness, and to provide for sinking funds. The council shall then meet in joint session between the first and third Mondays in December of each year, and make a budget of the estimated amounts required to pay the expenses of the city and county for the next ensuing fiscal year, based upon the mayor's budget, and for other purposes required by the charter. After this estimate is made, it is signed by the mayor and clerk and filed in the office of the auditor. Appropriations shall then be made by ordinance for the ensuing fiscal year, to the several purposes named. The necessary taxes are then levied to meet these appropriations, including state, school and special levies, which are then certified to the assessor, who is then required to extend the same upon the tax roll, and deliver to the treasurer for collection. The purpose of these several provisions are the same as stated in considering the duties and acts of commissioners and assessors, in assessing the property in counties and the levy of taxes upon property therein. In this connection, it should be noted, that in the city and county of Denver the total amount appropriated in any one year shall in no case exceed ninety per cent. of the anticipated revenues for that year, as estimated upon the tax levied on the assessor's valuation, and from other sources of revenue, and that the council is inhibited from ordering the payment of money for any purposes in excess of the amount appropriated for the current year, and that any liability incurred in any one fiscal year shall not be a charge upon, or paid out of the income or revenue of, any other fiscal year.

According to the averments of the respective complaints the defendant made the assessment required by law; thereafter met with the assessors of the counties of the state; compared his assessment with the assessments of property in other counties, but did not change his assessment; that he prepared an abstract of the assessment made by him, and delivered it to

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the state auditor; that this abstract was delivered to the state board of equalization; that no changes were made therein by this body; that it was certified to the proper officials; that he certified the total assessment made by him to the city council; that the board of equalization of the city and county of Denver made no changes; and that thereafter the taxing authorities of that municipality levied a tax for the ensuing year based upon the valuation certified by the defendant. By the complaint on behalf of the tax commission, it is not expressly averred that the state authorities have levied a state tax; but as the time for doing so had expired when the commission brought its action, and as it is averred that state officials have issued warrants based upon and in anticipation of the revenue to be derived from taxes collected upon property of the city and county of Denver, it will be assumed that such tax was levied. According to the respective complaints, the reduction in the assessed valuation of property was proposed, and attempted, to be made after all these steps had been taken; so that the next question to consider, in connection with these facts, is, the changes in the assessment roll which an assessor is authorized to make, after delivering the abstract of assessment to the state auditor.

The statutes bearing on this subject require him to make such changes as the state board of equalization direct, to supply omissions in the assessment roll as may come to the notice of the board of county commissioners of his county, and necessarily perform the same act when directed by the board of supervisors of the city and county of Denver in their capacity as a board of equalization. He may also, on the application of a taxpayer whose property has been twice assessed, or whose property has been assessed which is exempt, or of which the taxpayer was not possessed when assessed, or has been assessed too high, correct such assessment; but these applications must be made and hearings thereon concluded before the first day of the meeting of the county board of equalization. He may also supply omissions and correct errors or defects in

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the tax roll when it can be ascertained therefrom what was intended, at any time before the return of the assessment roll to the treasurer; but these corrections are merely clerical. This embraces all the changes he is authorized to make after the abstract has been delivered to the state auditor, so that it is evident he is not authorized by statute, either directly or indirectly, to make the horizontal reduction complained of; and hence, it must logically follow, that except in the particulars above mentioned, his roll is deemed complete upon delivery of the abstract of assessment to the state auditor. If the defendant assessor desired to make uniform reduction on the valuation of property in the city and county of Denver, the time for him to have done so was when he was vested with that power, which was after meeting with the county assessors, and before he delivered his abstract to the state auditor, for after such act, according to the statutes, his assessment roll was completed, and he could make no change thereafter, except as specifically authorized. That other changes than those mentioned are inhibited, is made manifest by the fact that a board of county commissioners (and in the city and county of Denver, the board which performs its functions) is expressly inhibited from making any change in the way of increasing or decreasing the total valuation of the property of a county, as exhibited by the assessment roll furnished by the assessor, except as an incident of equalization, and that any changes which the assessor is authorized to make, on the application of a taxpayer, must be made before the first meeting of the county board of equalization.

The wisdom of these provisions is evident. The assessors meet at the state capitol for the purpose of comparing assessments, so that there may be a uniform valuation of property of the same classes in the state. If such uniformity does not exist, they make the corrections which will bring about this result. The abstracts of assessment are then delivered to the state auditor. The state board of equalization may order changes if they find the different classes of property in the

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state have not been uniformly assessed. Upon the total valuation as shown by the abstracts of assessment, a state tax is levied. Upon the total valuation of the assessments in each county, the county authorities levy taxes for county purposes; and should the assessors, after these levies are made, have the authority to make a horizontal reduction in the total assessed valuation of their respective counties, the revenues which the state and county authorities are required to provide by specific rate of taxation, would be reduced accordingly. The defendant has no authority to do this. If the taxes are too high for state purposes, or too high for the city and county of Denver, the fault lies with the taxing authorities, who, alone, are responsible to the people for this result, and he cannot correct these mistakes if they have been made, by doing an act which the statutes do not require him to do, but which they inhibit him from doing. We reiterate, that the time for him to have made the reduction he is now attempting to make, if justified at all, was when he met with the county assessors.

The next question to determine, is, whether a court can inhibit the defendant from making the proposed reduction. It is true, as contended by counsel for defendant, that the judicial department of the state has no power by an injunction to control an official in the exercise of his official functions of a governmental and executive nature—*People v. District Court,* 29 Colo. 182—but that is not this case. On the contrary, it clearly appears that defendant is violating the law relating to assessments by doing, or proposing to do, an act which the law inhibits him from doing, and with respect to which he has no authority or discretion, whatever. In other words,, he is attempting to undo a completed act. After an assessment has been completed, the assessor may not alter or change it unless he has express statutory authority to do so. *Cooley on Taxation,* 3rd Ed. 765. In applications for relief by injunction against the acts of public officials, the material question, generally speaking, is, whether they are acting within the scope of their authority, or whether they are transcending that au-

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thority. If they are doing the latter, and the resulting injury is not susceptible of reparation by proceedings at law, they may be enjoined from the commission of such illegal act.—High on Injunctions, 4th Ed., secs. 1308-1309.

It is manifest that an action at law cannot give the plaintiffs adequate relief, or any relief whatever, and that an injunction to restrain the defendant is the only remedy which will prevent the wrongful acts of the defendant, and give plaintiffs the relief to which they are entitled, for the obvious reason that it is the duty of the defendant to extend the levy upon the assessment acted upon by the officials authorized to levy such tax, and deliver the tax roll, as thus completed, to the treasurer for collection. This is a duty imposed on the defendant by law with respect to which he has no discretion, and is, therefore, ministerial, and hence, a duty which a court can compel him to perform.—Cooley on Taxation, 3rd Ed., 1359.

Counsel for defendant contend that a statutory remedy is provided, and that, therefore, the actions at bar cannot be maintained. This contention is based on ssection 5636, R. S., which provides that if, in the opinion of the state board of equalization, any county assessor has assessed the property of his county manifestly below its true value, that then the board, upon reasonable notice to the delinquent assessor, may require him to make it conform with the statutes. In our opinion, this section does not apply to an assessor who is making a horizontal reduction in a completed assessment, but covers a case where the valuations of property assessed, as originally returned and from which the abstract of assessment is compiled, that is lodged with the state auditor, when it appears that such assessment does not, for any of the reasons enumerated in the section, comply with the statute.

It is also urged on behalf of defendant that there is no allegation of facts in either complaint from which it appears that irreparable injury will result to plaintiffs or either of them, by the act of the defendant in reducing the assessed val-

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uation, in that it is not charged upon the part of either the state or city that they will not have sufficient revenue to pay the expenses and debts of the several departments of government. That question is in no sense involved, as the case turns entirely upon the proposition, that the proposed reduction by defendant is, *ipso facto,* illegal, for the reason that the law inhibits him from making it.

The judgments of the district court are reversed and the causes remanded, with directions to overrule the demurrers, and for such further proceedings as will harmonize with the views expressed in this opinion.

*Reversed and Remanded with directions.*

Decision *en banc.*

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[No. 6793.]

## GREEN VALLEY DITCH CO. ET AL. v. FRANTZ ET AL.

**WATER RIGHT—*Abandonment*—Failure for the period of eighteen years to apply to beneficial use, or in any manner control, water to which one is entitled, must be regarded as an abandonment of the right, unless some peculiar condition excusing the delinquency is shown. Merely asserting a claim to the right through a continuous chain of paper title, even though coupled with an oral assertion of the right upon a single occasion, will not suffice.**

**The evidence examined and *held* to lead to the irresistible conclusion that those under whom plaintiffs claimed had abandoned the right.**

*Error to Denver District Court.*—Hon. HUBERT L. SHATTUCK, Judge.

Mr. JOHN W. HELBIG and Mr. D. B. KINKAID, for plaintiffs in error.

Messrs. BARTELS & SILVERSTEIN and Messrs. ALLEN & WEBSTER, for defendants in error.

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Mr. JUSTICE HILL delivered the opinion of the court:

This action was brought by The Green Valley Ditch Company (a corporation) on behalf of itself and its stockholders against the defendants in error, Frantz and Benton, for the purpose of quieting its title, and that of its stockholders, in and to a certain ditch and the appurtenances thereunto belonging, including appropriations. The defendants by their answer claim an interest in the ditch and the waters carried therein. They prayed that they be adjudged the owners of a certain interest in the ditch and water. The allegations in the answer are denied. The judgment was in favor of the defendants quieting their title to one-twenty-sixth of the water theretofore used upon any or all of the lands lying under the ditch. It also gave them the right, without interference, to its use and enjoyment, through the ditch, subject to prorating in times of scarcity. The plaintiffs bring the case here for review upon error.

Upon September 23rd, 1907, the defendants entered into a contract with its then owners to purchase block 5, Manchester, which, including streets and alleys, contains about five acres. They are in possession and claim that a certain interest in the ditch and waters carried therein belongs to this land. Upon October 1st, 1907, they made written demand upon the plaintiff company to have such interest recognized and water furnished therefor. Upon January 24th, 1908, this demand was formally refused; this suit was instituted upon the same date.

The main contention pertains to the abandonment by the predecessors in interest of the defendants to that portion of the ditch and waters theretofore appertaining to this land. There is but little conflict in the evidence. There is an absence of evidence pertaining to some matters, although apparently sufficient to satisfy both sides. This pertains particularly to the amount of water to which the ditch is entitled, and the date of its appropriation. No decree covering these questions

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was plead or offered in evidence. It appears to be assumed by counsel (and for the purposes of this case we shall so treat it), that the pleadings and evidence discloses that this ditch has, or did have, an appropriation of 2.25 cubic feet of water per second of time from the South Platte river, and 2 cubic feet of water per second of time from a small tributary called Sand creek. The dates of these appropriations, so far as the pleadings or any evidence is concerned, are not attempted to be fixed.

The record discloses, that between 1868 and 1880 a small ditch was constructed about two and one-half miles in length; that its headgate was located on the west bank of the South Platte river, from whence it runs in a northerly direction; that it crosses this so-called Sand creek about half way down; that as early as 1885 Hiram and Artemecia Epperson (husband and wife) were the owners of eighty acres of land in section 21 and of seventy acres in section 15, all in township 4, south range 68 west; that this ditch (called the Epperson ditch) was used exclusively for irrigating some portions of this land and was evidently considered as appertaining thereto; that the house in which the Eppersons then lived was situate in section 21; that the portion covered by the building thereafter became a part of block 5, Manchester; that in 1887 the Eppersons began to sell off portions of this land, which sales included water out of, or an interest in the ditch therefor; that considerable of this land was sold and has ever since been used for gardening purposes, and has been continuously irrigated through this ditch; that these are the lands owned by the stockholders of the plaintiff company; that they are lower down the ditch than block 5 in Manchester; that in 1888 the ditch was in a dilapidated condition; that in 1888 or 1889 a meeting of consumers was held for the purpose of devising ways and means to repair and put the ditch in proper condition, it being then partially obliterated in places and out of repair; that Hiram Epperson and wife were present at this meeting, and when requested to assist in such repairs and maintenance for the benefit of lands

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then owned by them, including block 5; Manchester, they refused to do so, and, in substance, said that they did not need the ditch, that they were not using water from the Platte river, and had no further use for it and told the plaintiffs that the ditch was theirs, to take it.

The evidence discloses beyond contradiction that the Eppersons did not use the ditch from the South Platte river to where it crosses Sand creek, or secure any water from the South Platte river, or in any manner assist in its maintenance or participate in its control, above Sand creek since 1886. There is evidence that they used the ditch below Sand creek and run a small amount of water, through it, obtained from Sand creek, during the years 1887, 1888 and possibly 1889. The contention of the defendants is, that the Eppersons' refusal to contribute was limited to that portion of the ditch above Sand creek, but it is undisputed that they never used, or contributed to repair, or thereafter assisted in maintaining the ditch above Sand Creek, after 1886, or below that point after 1889, but that during 1888 and 1889 and thereafter the company's stockholders, or their predecessors in interest, reconstructed, repaired and cleaned out, whenever necessary, the entire ditch at considerable expense; that they constructed a dam in the Platte river at a cost of about $2,000, and thereafter maintained the ditch at an expense of from three to five hundred dollars a year, and ever since have had the exclusive use and enjoyment of the entire ditch and waters run therein. The record is not clear as to the amount of water, from where secured, or upon what portions of these lands used, or the extent of such use upon any of them, prior to 1887.

In November, 1889, the original plat of Manchester or Manchester addition was filed. This was signed by Hiram and Artemecia Epperson with the usual dedications of streets, alleys, etc.; it covers portions of these lands then owned by the Eppersons, including what is termed their old home site covered by block 5. About November, 1889, the land then

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owned by the Eppersons covered by this plat was conveyed to McCallum, who, in November or December, same year, conveyed it to The Manchester Land Company; this included block 5. In June or July, 1890, this company proceeded to destroy the whole length of this ditch where it crossed the streets and blocks in Manchester. Upon August 2nd, 1890, a suit was instituted by the stockholders of this plaintiff and some of their predecessors in interest against The Manchester Land Company to restrain it from destroying the ditch upon its lands, or in any manner interfering with their running water through it. This resulted in an agreement between the then owners of the land (which included this block 5) and the consumers, whereby the land company allowed them to reconstruct the ditch in a certain manner, and have the exclusive use and enjoyment thereof during the pendency of the action. What disposition was made of this suit is not disclosed, but the consumers continued to operate and have the exclusive use and control of the ditch, as before, without any adverse claim being made by anyone until about the time of the institution of this suit, during which period they increased their acreage irrigated from thirty-three and one-half to about fifty acres.

It is proper to observe that the stipulation entered into in the suit between the land company and the consumers recognizes the latter as being the owners of the ditch, in the following language, "The Manchester Land Company will convey all water which the plaintiffs may bring down in their old ditch." It will be noted that at this time it made no claim to either ditch or water, but was attempting the destruction of the former.

In October, 1906, these consumers incorporated the plaintiff and executed a deed to it for the ditch, etc., accepting its stock in payment therefor; reserving, however, the water rights and appropriations as theretofore owned and enjoyed by them. This evidently was for the purpose of providing a regular system for the maintenance of the ditch and the distribution of water to those entitled thereto. This ditch company,

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at all times thereafter, continued to operate and manage the property. Other than the deed to it by its stockholders, there does not appear to have ever been any deeds executed by anyone for a right of way for the ditch. In addition to the stipulation referred to in the other suit, there are some reservations in some of the instruments executed by the Eppersons pertaining to some of this land, recognizing this ditch as having a right of way.

The record further discloses, that about 1891 these water consumers had trouble with a paper mill company, which, in building a large plant, destroyed a part of the canal, and, to avoid litigation, they (under protest) allowed the company to substitute a pipe line for eight or nine hundred feet and to change this right of way from where it originally was situate upon the Manchester and other lands, and for this distance to run the pipe line upon the right of way of a railway company; that since which time there has never been any flume, pipe or laterals or other means by which water could be conveyed to block 5, Manchester.

The defendants' evidence discloses, that a deed of trust was given back to the Eppersons, or one of them, upon the Manchester land; that The Manchester Land Company failing to pay in 1897 deeded back (in lieu of foreclosure) the premises in question to Mrs. Epperson; that thereafter she conveyed to L. Cook, trustee, who thereafter, in April, 1901, conveyed to William P. Epperson and Frank Steinmetz, who thereafter, in 1904, conveyed them to Lenora Epperson, who thereafter conveyed them to Louis and Theodore Bartels, who shortly prior to the bringing of this action entered into the agreement of sale with the defendants in error. It is proper to state that these sundry conveyances and others included therein declarations of all water rights belonging and appertaining to the land conveyed. This chain of paper title is all the uncontradicted evidence that the defendants introduced pertaining to non-abandonment, or intention by any of the owners of this land to claim any interest in the ditch or water.

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The only other evidence upon this subject is that of William P. Epperson (a son of Hiram Epperson, and stepson of Mrs. Epperson), who states that in a conversation with sundry of these water consumers about six or seven years prior to the bringing of this suit, he asserted a right to the use of this water. This was denied by the plaintiff's witnesses. It is further disclosed that the contract of purchase from Bartels to the defendants concludes with the following paragraph, "In the event that no water rights belong to said land, then the above one hundred ($100) dollars to be refunded, and this receipt to be null and void."

In *North American Exploration Co. v. Adams,* 104 Fed. 404, wherein rights to water in Colorado were involved, it is said:

"The abandonment of the right to divert and use the waters of a stream is not different in its nature or character from the renunciation of any other right which is asserted and maintained by its use. It may be express or implied. It may be effected by a plain declaration of an intention to abandon it, and it may be inferred from acts or failures to act so inconsistent with an intention to retain it that the unprejudiced mind is convinced of the renunciation."

In *New Mercer Ditch Company v. Armstrong,* 21 Colo. 357, it was held that a corporation may not divert water from a stream and make beneficial use of a portion thereof, and as to the residue so diverted never make any use whatever for over twenty years from the time of the original diversion, for more than eighteen years from the time of an additional diversion, and for more than nine years after its rights to the quantity theretofore diverted have been judicially established, and then be heard to assert its claim to such excess after subsequent appropriators have continuously, adversely, openly and notoriously been enjoying the use thereof for such lengths of time.

In *Alamosa Creek Canal Company v. Nelson,* 42 Colo. 140, this court held that non-use of water continued for a

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considerable time, coupled with other acts showing an intention on the part of the owner not to resume or to repossess himself of the thing whose use he has relinquished, constitutes abandonment.

In *Sieber et al. v. Frink et al.*, 7 Colo. 148, it was held that a failure to use water is competent evidence of an abandonment of the right thereto, and if continued for an unreasonable period it creates a presumption of an intention to abandon; but this presumption is not conclusive and may be overcome by other satisfactory proof.

When these well known rules are considered in connection with our recognized doctrine of priority by appropriation, without attempting to lay down any definite rule pertaining to the length of time necessary to create the presumption of abandonment upon account of non-use, coupled with other acts, although slight, disclosing an intention to abandon, it may well be said that a period of twenty years or even eighteen years is too long a time for an individual or corporation to be permitted to thereafter make claim to an appropriation without having asserted a right thereto, or attempting to convert, control or in any manner to apply it to a beneficial use during some portion of that period, unless some peculiar fact or condition can be shown by which the party or parties might be excused during that length of time, and such excuses must be other than making a claim thereto down through a continuous chain of paper title. Here no excuse is given or peculiar circumstances attempted to be shown; but to the contrary, during all this time the predecessors of these defendants sat silently by and allowed not only the plaintiffs to act as above set forth, but allowed other consumers both up and down the river to construct many ditches and reservoirs, and invest large amounts in the construction thereof, and the diversion and application of waters to a beneficial use, without any assertion of right upon behalf of the predecessors of the defendants to the ownership or right to use any of the waters from said streams.

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Outside of the alleged paper title, the only conflict in the evidence pertaining to abandonment is in the alleged declaration of one of the predecessors in interest of the defendants, who says that some seven or eight years before suit he claimed the right to a portion of the water in said ditch. This was disputed, but if true it was but an oral statement followed by no act, for which reason it could not change conditions.—*Hewitt v. Story,* 40 L. R. A. (Calif.) 265. While upon the other hand the undisputed declaration of his predecessors, to-wit, his father and stepmother, is to the fact that they declined to participate in the expenses of the reconstruction of the ditch, and the repairs and maintenance therefor, or in its use thereafter, stating in substance that they had no use for it, that it belonged to the plaintiffs, for them to go take it, etc. Later, their grantees made an effort at the complete destruction of the canal by plowing it in for about twelve hundred feet, wherever any street or alley in Manchester was to cross it, and they persisted in thus having it destroyed until a suit was instituted against them with the view of restraining them from accomplishing such destruction. This contention was thereafter adjusted under some arrangement by which the plaintiffs were allowed to reconstruct, and have enjoyed its use ever since, as theretofore.

It is also undisputed that the grantors of these defendants never made any claim to any interest in the ditch or waters, and that the defendants in buying had notice of conditions and protected themselves by the clause referred to in their contract of purchase. It is evident that the trial court misconstrued the legal effect of the evidence.

The facts are along the same lines as those in *Dorr v. Hammond,* 7 Colo. 79. The conclusion is irresistible, upon a review of the whole record, that the appropriation acquired by the Eppersons for the lands now claimed by the defendants by means of the application of water upon a portion of it, through this ditch, on and before 1887, 1888 and 1889, was afterwards abandoned. The testimony shows that no water

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was thereafter taken through this ditch from either the Platte river or Sand creek for this land, and no claim made by any owners of it that they be furnished with any water until after the contract of purchase by the defendants in October, 1907, a period of over twenty years, when applied to the south Platte river and that portion of the ditch above Sand Creek, being about one-half of the ditch, and a period of eighteen years or over, when applied to the lower end of the ditch and the waters derived from Sand creek. During this entire period, the Eppersons as well as all subsequent owners, interposed no objections to the plaintiffs' application of all the waters that the ditch would carry, but to the contrary not only stood by and saw them partially reconstruct the ditch at considerable expense, also continue its maintenance, but permitted them, during all these years, to divert all the waters carried through the ditch, without even notifying them of their claim thereto other than the one alleged statement of the son, William P. Epperson, (which is in dispute). It is undisputed that the town site company attempted the destruction of the entire ditch through the land platted by the Eppersons while the company was the owner and in possession. These facts all tend to show a voluntary yielding up and waiver of the priority acquired by Eppersons (not sold to the other consumers) without any intention of resuming it and constitute a clear case of abandonment.

The plaintiffs are entitled as against the defendants to a decree quieting their title to the ditch and waters appropriated by them and their predecessors in interest heretofore carried therein to the extent of such appropriations from both the South Platte river and Sand creek. These should be limited to the amount that they have heretofore enjoyed as disclosed by the evidence, which is to be tested by the amount heretofore actually carried through the ditch and pipe line and applied to a beneficial use, making the necessary allowance for seepage and evaporation. When the amount of land heretofore irrigated, the capacity of the pipe line constituting a part of the

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ditch and the waters heretofore carried are considered, it is evident that it does not exceed 2.90 cubic feet of water per second of time from both sources.

The judgment is reversed and the cause remanded with instructions that a decree be entered in harmony with the views herein expressed. *Reversed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 6713.]

## ELDER v. WOOD.

**PRACTICE IN THE SUPREME COURT—*Appeal From a Judgment Pursuing a Mandate*, of this court awarded upon the judgment in a former appeal will be dismissed.**

*Appeal from Lake District Court.*—Hon. M. S. BAILEY, Judge.

Mr. GEORGE R. ELDER, for appellant.

Mr. FRAZER ARNOLD and Mr. SAMUEL HUSTON THOMPSON, JR., for appellee.

*Per Curiam:*

This case was determined by this court in *Wood Impleaded, Etc. v. McCombe et al.*, 37 Colo. 174, and the cause was remanded with directions to the lower court to vacate its judgment and enter another one in favor of Wood. A writ of error from the supreme court of the United States was sued out to review the judgment of this court, and that judgment was affirmed in *Elder v. Wood*, 208 U. S. 226. Thereupon, the district court entered judgment in obedience to the mandate of this court. The present appeal is from the latter judgment. There were no proceedings subsequent to the entry of

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that judgment. The appellee Wood has filed a motion to dismiss this appeal. The motion must be sustained.

Every question now raised by appellant, including the question whether a construction of the constitution of the United States or of this state was involved, was discussed by him in his principal brief, or his brief on his motion for rehearing in the former appeal, and therein determined. The judgment appealed from is, in effect, the judgment of this court entered in exact accordance with our mandate and an appeal therefrom cannot be entertained.—*Stewart v. Salamon*, 97 U. S. 361.

*Motion to dismiss appeal granted.*

Decision *en banc*.

CHIEF JUSTICE CAMPBELL and MR. JUSTICE BAILEY not participating.

Decided October 7, A. D. 1912. Rehearing denied March 3, 1913.

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[No. 7637.]

## THE PEOPLE OF THE STATE OF COLORADO EX REL. V. THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT ET AL.

**DISTRICT ATTORNEY—*Appointment of Special Prosecutor*—Upon affidavit filed, charging the district attorney, his deputy, and others with an assault upon the affiant, the district court appointed an attorney to prosecute the offense charged. The attorney so appointed filed an information against all the parties named, jointly. The district attorney and his deputy, being tried separately, were acquitted. As to the others, the special prosecutor entered a *nolle*, and later, by leave of the court, withdrew from the prosecution. The same affiant thereupon filed a second affidavit charging the same persons with instigating a riot at the same time and place mentioned in the former affidavit, and with committing an assault, not only upon himself, but upon members of his family as well. The district attorney thereupon filed a motion to quash the last information, upon the ground that the court, by the first appointment had exhausted its powers, and the second information was therefore a nullity.**

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**The motion was held properly denied and both certiorari and prohibition was refused. The authority of the court to appoint a special prosecutor in the second instance was declared to be the same, under the statute (Rev. Stat., sec. 2109), as in the first.—*Gray v. District Court*, 42 Colo. 298, distinguished.**

**HILL, J., dissented.**

Mr. T. E. WATTERS, for petitioner.

Messrs. CRUMP & ALLEN and Mr. E. M. SABIN, for respondents.

Mr. JUSTICE BAILEY delivered the opinion of the court:

This is an original application for a writ of certiorari and prohibition. At a primary election, held September 3, 1910, at the residence of John W. Maloney in a South Englewood precinct, Arapahoe county, an altercation ensued which ended in an affray. It is out of prosecution over that difficulty that this application arises.

A petition was filed, October 5, 1910, on affidavit by Maloney, charging the petitioner here and Luke J. Kavanaugh, district attorney and deputy district attorney, respectively; and Claude E. Street, Joseph Kille, John D. Frederick and P. Z. Fogle with an assault, with a deadly weapon, upon him, praying the appointment of a special prosecutor to take charge of and investigate the matter, because of the personal interest therein of the regular prosecuting officers. The court thereupon appointed J. W. B. Smith, Esq., an attorney of the Colorado bar, to act in that capacity. On November 11, 1910, he filed an information against the parties named, charging them jointly with the alleged offense. Morgan and Kavanaugh were put to trial separately. Under court instructions, the jury returned a verdict of not guilty, and they were discharged. Thereupon Smith entered a *nolle prosequi* as to the defendants Street, Kille, Frederick and Fogle, and they also were discharged. Presently thereafter Smith filed his report with the district court, showing, among other things, the matters above set forth, and withdrawing from

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the prosecution, which withdrawal was by formal order duly accepted.

Thereafter Maloney filed another affidavit, charging the same persons with instigating, at the time and place previously designated, a riot, and charging them with an assault, not only upon himself, but upon members of his family as well. On the same day E. M. Sabin, Esq., an attorney, filed a motion for the appointment of a special prosecutor, based on Maloney's affidavit, showing the disqualification of the district attorney and deputy because of interest. Pursuant to that motion, an order was entered appointing Sabin as such prosecutor, duly empowered to take such action on the affidavit as to him might seem proper. In making this order the court found that both Morgan and Kavanaugh had a personal interest in any investigation of the offenses of which complaint was made.

Later, Maloney filed two more affidavits, one charging Street, Frederick, Kille and Fogle with an assault on his person, the other charging Morgan with unlawfully beating Mary E. Maloney, the wife of affiant, a new offense, but all growing out of the difficulty at the primary. Sabin thereupon informed against these parties for the alleged respective offenses. The petitioner, Morgan, filed a motion to quash the information against him, setting up, by affidavit, that there was no lawful charge upon which he could be tried, for the reason that the court had exhausted its power, relative to this matter, by the appointment of Smith as special prosecutor, and that therefore the information filed by Sabin was a nullity; and also because the alleged offense prosecuted by Smith, against him, is the same offense charged in the information filed by Sabin. The motion was overruled, and Morgan applies for a writ prohibiting the respondents from further acting under the order naming Sabin special prosecutor, because of the supposed lack of authority in the court to make the appointment.

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We have examined the record with the utmost care and are persuaded, beyond question, that it was within the jurisdiction of the court to name the second special prosecutor. The interest of Morgan and Kavanaugh, district attorney and deputy, respectively, in the matter to be examined, remained the same as originally. Attorney Smith, first appointed, had withdrawn as such officer, the withdrawal having been allowed by the court and noted of record. Thereafter new affidavits, embodying new charges, were formally presented. Some disposition must be made of them. By the affidavits the power and authority of the court were invoked. In this state of the record it seems that nothing was left for the court to do but designate a suitable person to represent the people. The regular prosecuting officers were disqualified, and the special prosecutor having declined to act further, plainly it was not only within the power of the court, but was its clear duty to appoint an attorney to take action upon the matters thus presented. There was no attempt to direct the action of that officer or control his discretion. The whole controversy is as to the authority of the court to make the second appointment. If it had jurisdiction, the information must be met and defended against in the court where filed, and if it did not have jurisdiction, then further proceedings should be prohibited. The sole question is, did the court have authority to act? If it did, whether it exercised that authority correctly or erroneously are matters which may not be inquired into in this proceeding. That it had such authority seems too clear for argument. New and different charges were before the court, the special prosecutor first named had withdrawn, the regular officers were disqualified, and unless a substitute may be named, the whole machinery of the court, so far as this matter be concerned, is completely blocked. It was never contemplated that such a situation could be brought about by any one, or by any set of facts or circumstances. All conditions were present to give the court authority, under the statute, to appoint a special prosecutor, and we are unable

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to see why it did not have the power to do so, although such appointee be a second one, just the same as, under like circumstances, it had power to appoint originally. The jurisdiction of the court was complete, and there is nothing in the statute, which confers the power of appointment, to indicate a limitation upon the court in respect to its exercise. The discretion is with the court to appoint, or decline to, as public interest seems to require and demand.

The petitioner relies upon the case of *Gray, District Attorney, v. District Court,* reported in 42 Colorado 298, as determining that the court had no jurisdiction to appoint in this case. The two cases are clearly distinguishable. The thing in the *Gray* case which disclosed lack of jurisdiction in the court to remove him, was the fact that it did not appear that he had any personal interest in the subject-matter of the trial. In this case it is shown that the petitioner has precisely the sort and kind of interest in the matter to be examined that is, by statute, made cause for the removal of a regular district attorney and the appointment of a special prosecutor. In the *Gray* case the interest contemplated by statute was wholly lacking; while here such interest fully appears. Under the facts and circumstances of this case, the court below clearly had authority to appoint Sabin, and the informations presented by him were lawfully and properly filed and must be disposed of in the manner prescribed by law for the disposition of all criminal charges.

Since the informations were presented by one duly authorized, whatever objections or defenses there may be to them, some of which have been suggested in these proceedings, either in law or fact, must be offered and urged in the trial court, in the usual and ordinary way, where a complete, adequate and speedy remedy at law is afforded, with full opportunity for review should there be occasion for it. To hold otherwise would be, in effect, to convert the writ of prohibition into a writ of error, a course which is contrary to reason and unsupported by precedent.

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The application and alternative order are dismissed and the writ of prohibition denied.

Decision *en banc.*

Mr. JUSTICE MUSSER not participating.

Mr. JUSTICE HILL dissenting:

I cannot agree with the conclusion reached by the majority. In *People ex rel. v. District Court,* 23 Colo. 466, it was held that the district attorney has power to discontinue any criminal cause without the consent of the court, and that prohibition lies to restrain a district court from trying a criminal cause after the district attorney has entered a *nolle prosequi.* It is an elementary principle of law that nothing can be done indirectly which cannot be done directly. This applies to the courts as well as to everyone else. It appears to me that our refusal to grant this writ is to allow a violation of this elementary principle. In *Gray v. District Court,* 42 Colo. 298, we held that the writ of prohibition will lie against the appointment of a special prosecutor to act as district attorney where the facts disclosed were not sufficient to authorize the appointment.

The record discloses, that the court (Honorable Charles McCall, judge presiding), upon October the 3rd, 1910, (after the filing of Maloney's first affidavit) appointed attorney Smith as special prosecuting attorney therein, to investigate and take such steps in the premises as he deemed proper, with all the powers of a duly qualified district attorney and as fully as if his powers were especially set forth and enumerated in the order; he performed these duties unquestionably proper, lawful and right, as they appeared to him. In so doing upon November the 11th, 1910, he filed an information against six persons, among which were the district attorney and his deputy; these latter two, upon November 21st and 22nd, 1910, were tried and by court instructions (Honorable Charles Cavender, judge presiding), the jury returned ver-

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dicts of not guilty and they were discharged. There does not appear to have been any steps taken to have the rulings of judge Cavender reviewed by this court, as provided for by law in case the district attorney feels that such rulings were wrong. Thereafter, special prosecutor Smith entered a *nolle prosequi* as to the other defendants named in the information and they were discharged. Upon January 21st, 1911, attorney Smith filed his report in said court (addressed to and considered by Honorable Charles McCall, judge presiding). This report discloses, that he made a full investigation of the entire matter by talking with Maloney and members of his family, with other election judges and others who were present and saw what took place at the time referred to; that after having made this investigation he prepared and filed the information charging, not only those named in the Maloney affidavit (who were Morgan, Street, Kavanaugh, Kille and Frederick) but also one Fogle, with the commission of a crime in connection with the transaction. After filing this report and its acceptance, he was discharged from any further duty in respect to said matters. Thereafter, on March 11th, 1911, Maloney filed another affidavit charging sundry crimes to have been committed by the same persons at the same time, all growing out of the same transaction covered in his former affidavit. In the second affidavit he sets forth the fact of filing his former one, the actions taken thereunder, the result of said trial and dismissals, he also sets forth therein his version of the trial of Morgan and Kavanaugh and the dismissal as to the others and his reason for being dissatisfied therewith. His second affidavit reads in part as follows:

"That this honorable court has heretofore appointed an attorney at law to inquire into and investigate the riotous conduct and assault of the said parties hereinbefore mentioned, and the said attorney so appointed, after due investigation, filed a certain information in this court therein, making certain charges against the said Morgan and Kavanaugh,

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and the said mentioned Morgan and Kavanaugh were brought to trial and a jury empanelled to try the charges therein made against the said Morgan and Kavanaugh, and the affiant herein took the stand and testified in said cause; that upon the conclusion of affiant's testimony, the honorable judge then sitting, directed a verdict in favor of the defendants in said cause, and suggested to the special prosecutor that all other cases in which informations had been filed be *nollied;* thereupon the said special prosecutor stated to the court that he had several competent and credible witnesses present who could and would testify to the effect that Claude E. Street on said September 3rd, 1910, drew a gun or revolver upon this affiant, and that the said witnesses would testify as to the facts concerning said assault; that the judge then sitting refused to hear such testimony and dismissed said suit, and upon the suggestion of the judge then sitting, the said special prosecutor *nollified* all other cases in which informations had been by him filed.

This affiant respectfully represents and states that in his opinion the ends of justice were not meted out, and that the parties who participated in said riot and assault should and ought to be prosecuted, and all the facts presented to a jury touching the guilt of the said parties of the matters charged herein."

It was upon this affidavit that the court (Honorable Charles McCall, judge presiding), appointed a second special prosecutor to investigate the matters set forth therein holding, that the district attorney and his deputy being interested, were disqualified. Upon August 10th, 1911, Maloney filed another affidavit charging Street, Frederick, Kille and Fogle with an assault upon his person with a deadly weapon, being the same charge stated in his first affidavit against the first three, and the same charge included in the information against all of them theretofore *nollied* by attorney Smith. August 10th, 1911, a second special prosecutor

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filed informations against all of said parties, as stated in the opinion. These included the identical charges against Street, Frederick, Kille and Fogle covered by the informations theretofore *nollied* by Smith.

The motion of the district attorney includes and involves the validity of the appointment of the second special prosecutor, and his right to review the work of the first one, as well as to file new informations and try defendants thereunder where similar ones were theretofore *nollied* by the former special prosecutor, as well as to continue a disability against the district attorney in the performance of duties belonging to that office in his district.

I have set forth at length the facts in order to show that the efforts of Mr. Maloney were, as stated in his second affidavit, to secure an investigation by a second special prosecutor, of the same matter for which the first one was appointed and acted, in hopes that he might reach a different conclusion from the first, and also to secure another trial covering the same transaction, or practically so, by making the charges slightly different from those theretofore tried, and also to secure the filing of two new informations charging the identical offenses against some of the same defendants that were contained in the first information which the first special prosecutor had *nollied,* and also to secure trials thereunder.

If as held in the case of *People ex rel. v. District Court. supra,* prohibition lies to restrain a district court from trying a criminal case after the district attorney has entered a *nolle prosequi* therein, then it appears to me that by denying this writ we are allowing this court to do, indirectly, what we have heretofore held that it cannot do directly, to-wit, by appointing a second special prosecutor; it also allows him to file new informations and try the identical charges contained in the information *nollied* by the first special prosecutor, without any showing that the first special prosecutor was in any way disqualified to act or had failed or refused to act. Like-

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wise, we are allowing a complaining witness, who is dissatisfied with the district attorney's (in this case the special prosecutor's) investigation of matters, without making any showing against him, to have another appointed to investigate the same transaction, who, perchance, may arrive at a conclusion in harmony with the views of the complaining witness; in my opinion, the court was without jurisdiction to do so. It will be observed that there is no contention made that Mr. Smith was disqualified or that he did not perform his duties as he saw them, or that he refused to act in the matter; but to the contrary, the record throughout discloses that he investigated the entire matter, this is self-evident, not only from his reports, but from the fact that he informed against Fogle, whose name is not mentioned in Maloney's first affidavit. To my mind, unless there is some showing to the contrary, no other rational view can be given his acts; for these matters he was the district attorney, he was learned in the law, he knew if dissatisfied that he could have had judge Cavender's rulings on law points reviewed by this court, also that the authority to enter a *nolle prosequi* against the other defendants, or to file any other informations pertaining to this entire transaction was vested in him; having done nothing further than as above stated, we must assume until a showing is made to the contrary that he took all action therein he thought proper and that he disposed of the entire matter as seemed lawful and proper to him before making his report and receiving his discharge. It was after all these matters had transpired that Maloney filed his second affidavit, and without making any charge to disqualify Mr. Smith or impeach his good faith or honesty, he attempts to again have the entire matter reviewed by another special prosecutor. Under the rulings in *Gray v. District Court, supra,* in my opinion, under such circumstances the court was without jurisdiction to make the second appointment. It will be observed that it is the actions of Mr. Smith as special prosecutor which

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it is sought to have thus reviewed. If it were alleged that he was interested or otherwise disqualified, then the trial court would have something to pass upon, but this is not the case; neither is there any showing that Mr. Smith had failed to investigate, had overlooked or left unfinished before his discharge, any portion of the entire transaction, but to the contrary his report discloses that he had finished and disposed of the entire matter. Mr. Maloney's second affidavit informs the court of Mr. Smith's appointment and his investigation and disposition of the matter, but in a manner not satisfactory to him. This was the state of the record upon the filing and presentation of Mr. Maloney's second affidavit and upon which the majority opinion says, the power and authority of the court were invoked and that nothing remained for the court to do but to designate a representative of the people to act upon the matters thus presented to the court. As I view it the second Maloney affidavit, when considered in connection with the Smith report (on file) to which it refers, discloses to the court the necessary facts showing that it was without jurisdiction to appoint a second special prosecutor, unless the rulings announced in both of the decisions above referred to are to be overruled; or we are to now say that things can be done by the courts indirectly which we have heretofore held cannot be done directly.

Decided January 6, A. D. 1913. Rehearing denied March 3, A. D. 1913.

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[No. 7611.]

## SILFORD ET AL. v. STRATTON.

1. TAX TITLE—*Void Deed*—A treasurer's deed appearing upon its face to be based on a sale to the county, and an assignment of the certificate by the county clerk more than three years after its issuance, is void.

2. LIMITATIONS—*Color of Title—Good Faith*—A deed void upon its face is sufficient color of title to set in motion the seven-year limitation act (Rev. Stat., sec. 4087). But it is not conclusive of the good faith of the party claiming thereunder. Affirmative evidence may be produced that the party claiming under such a conveyance, and asserting the defense of the statute, was conscious of the infirmity of his title, and while making payment of taxes, sought, by shifting the title through conveyances not recorded, to prevent the paramount owner from effectually assailing it. One so conducting himself will be denied the benefit of the statute.

*Appeal from Washington District Court.*—Hon. H. P. BURKE, Judge.

Messrs. ALLEN & WEBSTER, for appellants.

Mr. JOHN F. MAIL, for appellee.

Mr. JUSTICE BAILEY delivered the opinion of the court:

Complaint, in the usual form, was filed March 22, 1909, to quiet title to the land in controversy. The answer denies the allegations of the complaint, except wherein it alleges that defendant claims an interest in the land; it then sets up title in fee from the United States, by mense conveyances, in defendant; also title through a decree of the district court of Washington county, rendered and entered April 11, 1908, in favor of defendant, and against one E. P. Dalander, through whom plaintiffs claim title. In the complaint in that suit it is alleged, among other things, that no person other than E. P. Dalander claimed any interest in the land in dispute, of record or otherwise, at the time the suit, in which that decree was rendered, was commenced, October 31, 1907. By replication all new matter in the answer is denied. For a fur-

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ther reply, plaintiffs set up title in themselves, through a tax deed executed and recorded on the 27th day of January, 1901, from the county treasurer of Washington county, conveying to the remote grantors of plaintiffs the land described in the complaint; that such deed purported to convey these lands in fee simple, and was color of title made in good faith; that thereafter, under such color of title, the land being meanwhile vacant and unoccupied for more than seven successive years prior to the commencement of this action, plaintiffs and their grantors paid all taxes assessed thereon, and plaintiffs are therefore, under the statute, the legal owners thereof, according to the extent and purport of their paper title, for which reason the claim of title by the defendant is barred by the statute of limitations, section 4090, Revised Statutes of Colorado, 1908. The decree and judgment was for the defendant, that he is the owner in fee and entitled to the possession of the premises; that the treasurer's tax deed in question, and all conveyances thereunder, be canceled and set aside, and the cloud thereby created removed; and that defendant refund to the plaintiffs all taxes, paid by them and their predecessors, on the land, with interest and penalties. Plaintiffs bring the case here for review on appeal.

The sole question is, whether the claim of plaintiffs, under color of title, was made in good faith. The tax deed offered in evidence is void on its face, because it shows that it is based upon a certificate of sale of the property to the county which was assigned by the county clerk of Washington county more than three years after its issuance; so that this deed may only be counted upon as color of title. Plaintiffs rely upon title through it, and the payment of taxes for more than seven successive years, to defeat the claim of defendant. The proof, in addition to the tax deed, and mesne conveyances which purport to vest title in plaintiffs, shows that the taxes assessed upon this land for the years 1900 to 1908, inclusive, were paid by the plaintiffs and their grantors and predecessors in interest. If the claim of title was made

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in good faith, then it appears that the statute has in fact run, and that the title of the defendant is barred.

The record shows that the tax deed was issued to Frederick H. Davis and Charles T. Kountze on January 26, 1901, and passed to record on that day in the office of the county clerk. On July 20, 1906, Davis and Kountze conveyed to E. P. Dalander, which deed was duly recorded. On February 16, 1907, E. P. Dalander conveyed to S. A. Dalander, but this deed was not recorded until January 1, 1908. Notice of *lis pendens* in the suit of *Stratton v. Dalander,* begun October 31, 1907, was filed December 18th next thereafter. S. A. Dalander conveyed to Ida C. Silford, December 21, 1907, deed not recorded until June 15, 1908. March 19, 1908, E. P. Dalander filed a disclaimer in the Stratton suit. On April 11, 1908, decree was entered in that suit in favor of Stratton, quieting title in him. On June 13, 1908, Ida C. Silford conveyed to Charles A. Silford, one of the plaintiffs herein, which deed was recorded June 15, 1908, on the same day that the deed from S. A. Dalander to Mrs. Silford was recorded. On February 4, 1909, Charles A. Silford conveyed an undivided one-half interest in the premises to August Muntzing, which deed was recorded on the same day.

The testimony shows that Muntzing, one of the plaintiffs, was a member of the law firm of Muntzing & More, at Akron, Colorado, which had charge of the litigation between Stratton and Dalander, and that the correspondence of that firm concerning the same was mainly had with the other plaintiff, Charles A. Silford, residing in Iowa. The testimony of Silford shows that he is a brother-in-law of E. P. Dalander; that he was entirely familiar with the purchase by the latter of this property from Davis & Kountze; that he knew of the conveyance of E. P. Dalander to S. A. Dalander, in February, 1907, and of the pendency of the suit between Stratton and Dalander, to quiet title in the former to the land in question, but does not think this knowledge came to him before January 1, 1908; that he knew of the filing of the dis-

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claimer by E. P. Dalander on March 18, 1908, and knew that Muntzing & More were Dalander's attorneys; that he had had correspondence with them relative to the defense of suits involving several pieces of land in Washington county; that he knew when they filed the disclaimer for E. P. Dalander that the title had been conveyed to S. A. Dalander; that Ida C. Silford, to whom S. A. Dalander conveyed on December 21, 1907, ten days before the latter's deed was recorded, is his wife, and he knew of the conveyance to her; his wife conveyed to him on the 13th of June, 1908, and he afterward conveyed an undivided one-half interest to August Muntzing, the other plaintiff in the suit. In short, it satisfactorily appears from Silford's testimony, although he was an unwilling witness, called by the defense, that he had intimate knowledge of the entire transaction and was fully apprised of all the facts connected with it. The suit by Stratton to quiet title against E. P. Dalander was instituted before a single deed included in the chain of title under which plaintiffs now claim was seven years old. This suit had been begun in apt time, against the only person then of record as owner of the land, to have the tax deed declared void, of which fact Silford was well aware. Muntzing was attorney for Dalander, and must have been equally well advised. The tax deed through which plaintiffs claim was void on its face. No title could come from it except through the statute of limitation, upon proof that everything needful to be done to make it applicable had been done. Therefore it would not do to permit the owner of the patent title to reach the holder of the tax title in a suit to cancel the same before the statute had fully run, otherwise this worthless claim would be completely overthrown. It must be apparent to the most casual observer that it was to avoid that inevitable result that the title to this land was juggled among members of the family, deeds withheld from the record and the actual holder of the tax title kept undisclosed for the express purpose of allowing the limitation statute to run before the holder of the tax deed could be reached by

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legal process. A careful inspection of the record shows any other conclusion untenable. Under such circumstances it is impossible to say that the claim of plaintiffs under color of title is made in good faith. On the contrary, it clearly appears from the facts in the case that the element of good faith was entirely lacking, and that plaintiffs knew that the title relied on was in fact no title.

Under the statute of limitations relied upon, in addition to the fact that the land must have been vacant and taxes paid for seven successive years, three things are essential: there must be color of title; the party must claim under it; that claim must be made in good faith. If any one of these elements be lacking the title will be defeated.

While this court has held that a deed void on its face is sufficient color to set the seven-year statute of limitation in motion, it has never held that such a deed coupled with the payment of taxes, is conclusive of good faith. So that it was competent for the defendant in this case, as was done, to introduce affirmative proof to establish the fact that the plaintiffs did not act in good faith in the transaction. It was within the power of Silford to have the question of the validity of the tax title determined once for all, by having the holder of it appear in the Stratton suit. He not only did not do this, but instead, by affirmative action, put it beyond the power of Stratton to locate that title, and so reach and bring into court the actual holder thereof. His conduct in this particular furnishes additional proof of lack of good faith. It being clear that the element of good faith is absent, the plaintiffs ought not to be permitted to successfully rely upon the statute of limitation.

That good faith is essential, where in asserting a claim under color of title the statute of limitation is relied on, is settled by a number of authorities in our own state. In *Lebanon Mining Company v. Rogers,* 8 Colo. 34, discussing the matter of good faith, in connection with claim and color

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of title, under a plea of the statute of limitation, which at that time was five years instead of seven, as now, the court said:

"We come now to the second question presented in this case, viz.: appellant's affirmative defense, the statute of limitations. Under the act referred to (see General Statutes, sec. 2186 *et seq.*), the possession must have been for five years with 'claim and color of title in good faith.'

It is extremely doubtful, particularly in view of section 2189 being section 4 thereof, if this act was intended to apply in cases where the disputed territory is patented ground; but we are not obliged to pass upon that question. The possession is averred in the answer to have continued for about five and a half years prior to this suit. In view of what has already been said, it appears that such possession could not have been for five years under claim of title in good faith, for the *Wolfley* case was decided some time previous to the expiration of that period. Moreover, the matter of good faith is expressly made material by the statute. It was appellant's duty to prove not only his claim and color of title, but also the *bona fides* thereof; this it made no effort or offer to show. We do not think the court erred upon this branch of the case."

In that case the appellant was claiming through a patent which had been theretofore declared not to include the ground in controversy. The court held, in substance and effect, that inasmuch as the patent had been held not to cover the disputed premises, no presumption of good faith obtained in favor of one claiming under it, with full knowledge of the previous holding, but that good faith must be established by other proof.

And again in *Arnold v. Woodward,* 14 Colo. 164, beginning at the bottom of page 168, it was said:

"The claim of a bar by the statute of limitations (Gen. Stat., sec. 2186), is not well taken. Arnold's entry in the land-office had been set aside or disregarded, and the patent from the United States had issued to Woodward. Such is-

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suance of the patent necessarily indicates that all steps required in connection therewith were duly taken. During a large part of the period covered by Arnold's alleged adverse holding, these facts existed and were known to him. Under the circumstances, there was not such a 'claim and color of title made in good faith' as laid the foundation for an application of the statute."

In the case of *Warren v. Adams,* 19 Colo. 515, on pages 525 and 526, the court said:

"Nor can the appellants avail themselves of the provisions of section 2187 of the General Statutes, by reason of the payment of these taxes. The 'color of title' therein referred to must arise out of some conveyance purporting to vest in the grantee an interest in his own right adverse to the true owner, and not from one that constitutes him a trustee of the title for the use and benefit of such owner. And, furthermore, such claim or color of title must be made in good faith."

And again in *De Foresta v. Gast,* 20 Colo. 307, at page 311, the court said:

"In this case, defendant having color of title to the land by virtue of his tax deed, and having paid all taxes on the land for more than twice the period prescribed by the statute, is entitled to its protection, *provided* he has acted in good faith in the transaction."

In the case of *Hardin v. Gouveneur,* 69 Ill. 140, the supreme court of Illinois used this language:

"In a number of cases it has been inaccurately said, that a deed purporting to convey title is claim and color of title, made in good faith. Such a deed is undoubtedly color of title, having been received by the grantee, and acted under as though it conveyed title, such action implies claim of title. But color and claim may be made in good faith or in bad faith. The good or bad faith is not a result of color of claim. The faith, whether good or bad, depends upon the purpose with which the deed is obtained, and the reliance placed upon

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the claim and the color. A party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, can not render it availing, because of the want of good faith."

The foregoing statement fits the facts in the case at bar and supports the conclusion here reached. The court below having determined the controversy in accordance with the views herein expressed, the judgment must be affirmed.

*Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

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[No. 7612.]

SILFORD ET AL. V. HAYES.

**The case ruled by the judgment in number 7611 *ante* 248.**

*Appeal from Washington District Court.*—Hon. H. P. BURKE, Judge.

Messrs. ALLEN & WEBSTER, for appellants.

Mr. JOHN F. MAIL, for appellees.

Mr. JUSTICE BAILEY delivered the opinion of the court:

This case was tried below, and argued here in connection with case No. 7611, *Charles A. Silford* and *August Muntzing*, Appellants, *v. W. S. Stratton*, Appellee, just decided. The proofs and pleadings are substantially alike in both cases. The conclusion in No. 7611 is decisive of and determines the matters at issue in this case, and requires an affirmance of the judgment. *Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

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[No. 7218.]

## COLORADO NATIONAL LIFE ASSURANCE CO. v. CLAYTON, COMMISSIONER OF INSURANCE.

1. CONSTITUTIONAL LAW—*Revenue Bills*—A bill designed to accomplish some well defined purpose other than raising revenue is not within the prohibition of sec. 31, art. V of the constitution, even though, as incident to its main purpose, it contains provisions, the enforcement of which may produce revenue. An act, the primary purpose of which is to regulate insurance companies (Laws 1907, c. 193, Rev. Stat., c. 70) is not to be regarded as within the constitutional provision merely because certain small fees, and a tax upon the gross amount of the premiums collected in each year, are imposed upon the insurance companies.

2. ——*Statute Unconstitutional in Part*—If a statute contains an unconstitutional provision which was inducement to its passage, and all its parts are so closely connected as to compel the conclusion that the act would not have been passed without the vicious provision, the infected clause must be condemned to the extent of the infection.

3. STATUTES—*Construed*—An act making elaborate provision for regulating the business of insurance, and the conduct of insurance companies (Rev. Stat., c. 70) contained a section imposing, beside certain fees, an annual tax upon the gross amount of the annual premiums collected by the insurance companies, and exempted such corporations from all other taxes except those assessed upon real property. This exemption was void under sec. 6 of art. X of the constitution. Considering that since 1883, in all legislation upon the subject, insurance companies had been required to pay, in some form, a similar regulation tax, *held*, that the clause containing the exemption might be rejected, and the residue of the section saved.

*Error to Denver District Court.*—Hon. GREELEY W. WHITFORD, Judge.

Mr. CLARENCE A. BRANDENBURG, Mr. JACOB FILLIUS and Mr. WILLIAM E. HUTTON, for plaintiff in error.

Mr. BENJAMIN GRIFFITH, attorney general, and Mr. ARCHIBALD A. LEE, deputy attorney general, for defendant in error.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. December, 1909, plaintiff filed a complaint in the district court at Denver, alleging its incorporation under the laws of Colorado; that the legislature in 1907 passed an act regulating insurance companies within the state, and that defendant is the commissioner of insurance provided by the act; that section 16 of the act provides: 'All insurance companies engaged in the transaction of the business of insurance in this state, shall annually, on or before the first day of March, in each year, pay to the commissioner of insurance, two per cent. on the gross amount of premiums received within this state during the year ending the previous 31st day of December. Insurance companies shall not be subject to any further taxation except on real estate, and the fees provided by this act'; that section 74 repeals all laws relating to insurance in force prior thereto; that section 16 is a revenue measure and unconstitutional, because it originated in the senate, instead of the house; also that it violates sections 6, 9 and 10, article X, of the constitution; that prior to March 1st, 1909, plaintiff was enjoying in this, and other states, a large and profitable life insurance business; that its right to continue in business in this state depended upon its securing annually on the 1st of March, a license from the commissioner of insurance, and its right to transact business in other states depends upon its right to continue in business in this state; that the insurance act provides: Should the commissioner of insurance refuse to renew plaintiff's license, it becomes his duty to publish the fact in one or more of the Denver daily papers, and prohibits plaintiff from transacting any insurance business in this state until its authority shall have been restored by the commissioner; that its success depends on securing new business, and a failure to obtain a license upon the 1st of March, would have destroyed its business in Colorado, and would have caused the revocation of its license to do business

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in other states, because it is prohibited from transacting business without a license. Notwithstanding which, defendant, as commissioner of insurance, on March 1st, 1909, refused to renew the petitioner's license, or to issue to it a license unless it paid to him as commissioner of insurance, a two per cent. tax on the gross amount of premiums it received within the state during the year ending the previous 31st day of December, and threatened in that event to publish that plaintiff's license had not been renewed, and that it could not longer transact business within the state, and alleged should it attempt to do so, that its officers and agents would be liable to fine and imprisonment; that to prevent the destruction of its business, and to secure the required license, plaintiff then and there, under duress and under protest, and claiming and insisting that section 16 was unconstitutional and void, and that defendant as commissioner of insurance had no right to insist upon payment to him of the two per cent. tax, paid defendant as commissioner of insurance, the sum of $3,842.48, which was two per cent. of the gross amount of premiums received within the state during the year ending the previous 31st day of December, and thereupon defendant issued to plaintiff a license; that when the license was refused, plaintiff had complied with all the remaining insurance laws of Colorado; that defendant refused to return the money, though requested so to do; and it prays judgment for $3,842.48, with eight per cent. interest from March 1st, 1909, and costs.

December 13, 1910, the court sustained a general demurrer to the complaint, and plaintiff electing to abide by its complaint, entered judgment for defendant, and plaintiff brings the case here upon error.

2. The legislature passed insurance acts in 1883, 1895 and 1907, all of which required the payment of certain enumerated fees and a two per cent. tax on premiums. The act of 1883 required the payment of enumerated fees, a two per cent. tax annually on net premiums, and exempted insurance

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companies from further taxation except upon real estate. The act of 1895 required the fees, the payment of a two per cent. tax annually upon gross premiums received during the year; but made no exemptions. The act of 1907 repeals all prior acts, reorganizes and re-establishes the department of insurance with a commissioner of insurance at its head, and is a comprehensive code of insurance laws intended to protect the people and regulate the insurance business and insurance companies doing business within the state. It requires the payment of enumerated fees, a two per cent. tax annually on gross premiums, and exempts them from further taxation except on real estate.

3. This exempting clause in section 16 was held unconstitutional in *Imperial Co. v. Denver,* 51 Colo. 456; that is, it was there held that insurance companies must pay taxes on all their property, and that the exemption was illegal on account of constitutional restrictions, and it is claimed this makes the two per cent. tax illegal because the exemption was the consideration or inducement for its passage.

4. Plaintiff contends the tax is a revenue measure, and unconstitutional because the act originated in the senate instead of the house. This contention does not meet with our approval. A bill designed to accomplish some well defined purpose other than raising revenue, is not a revenue measure. Merely because, as an incident to its main purpose, it may contain provisions, the enforcement of which produces a revenue, does not make it a revenue measure. Revenue bills are those which have for their object the levying of taxes in the strict sense of the words. If the principal object is another purpose, the incidental production of revenue growing out of the enforcement of the act will not make it a bill for raising revenue. The primary object and purpose of this bill was to regulate insurance companies, and the insurance business in the state. It is a regulation or supervision tax, and the method of arriving at the amount, or because of its operation the act produces an excess which is required to be turned into

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the general fund, does not affect its validity or render it an act for revenue.—26 Am. & Eng. Enc. of Law, 539; 1 Story on the Constitution (5th Ed.), sec. 880; 1 Andrews' Am. Law, 241; *Twin City Nat. Bank v. Nebeker,* 167 U. S. 196; *Northern Counties Trust v. Sears,* 30 Ore. 388; *French v. People,* 6 Colo. App. 311; *Home Ins. Co. v. N. Y.,* 134 U. S. 594.

5. The remaining question is, what effect does the exemption clause in the section have upon the two per cent. tax; does it destroy the tax or does the remainder of the section stand without the exemption? Will the intent of the legislature be defeated by holding the exemption invalid, and the two per cent. tax valid? It is fundamental in the construction of legislative acts, if a statute contains an unconstitutional clause which was the inducement for its passage, and all its parts are so closely connected as to warrant the belief that the legislature would not have passed the valid part alone, then the law should be declared void. The power of the legislature to impose the two per cent. tax may well be conceded; but in determining its legality, we should try to ascertain the object and intent of the legislature, and, if we find the two per cent. tax on premiums is so dependent upon and closely connected with the exempting clause that the former would not have been passed without the latter, then it is illegal.

It is claimed by plaintiff, the intention in imposing on insurance companies the two per cent. tax on premiums was contingent upon their being exempt from the payment of other taxes except on real estate, and as the contingency is unconstitutional, the tax does not express the legislative intent; that the exemption was the inducement for imposing the tax, and the legislature would not have passed one without the other. If it is true the exemption was the inducement for imposing the tax on premiums, and the two clauses are so intimately connected as to make it clear that the tax on premiums would not have been imposed without the exemption then both should be declared illegal.

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We have attempted to show that the object of the legislature was to regulate insurance companies and insurance business in the state, and the intent was to create a fund for this purpose and for the maintenance of the insurance department. We have also said, because it produces an excess, which is required to be transferred into the general fund, does not make it a revenue measure or change the primary purpose of the legislature.

In arriving at the legislative intent, it is proper that we should consider the legislative history of this two per cent. tax. Insurance companies have been required since 1883, to pay a regulation tax of two per cent., sometimes with, and sometimes without exemptions; sometimes on gross, and sometimes on net premiums; but they have always been required to pay it in some form. This shows that it has always been the legislative intent since 1883, to require them to pay a regulation tax. The exemption has nothing to do with the necessity for requiring this tax, and we are not at liberty to presume it would not have been imposed without the exemption. We have no right under the circumstances and history of this tax to say, that because the exemption is unconstitutional, the tax would not have been imposed. The purposes for which it is needed are just as necessary, and just as pressing with or without the exemption. The exemption does not change the necessity for, or the object of the tax, or the intent of the legislature in requiring it. So it is not apparent that the exemption was the inducement which caused the legislature to impose it. The tax and the exemption are not so closely related or connected that the tax cannot stand and the exemption fall without doing violence to the legislative intent. Because the exemption is illegal does not change the general object and purpose of the legislature requiring insurance companies to pay a regulation tax. If the legislature had made no exemption, and carried out its object, it is evident it would have required a regulation tax. We believe the tax can stand without the unconstitutional part and that when

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the invalid exemption is expunged, the act is still operative and that the legislative intent can be carried into effect without the exemption.

If the section stood alone, as a primary and independent revenue measure, there would be force in the contention that the enactment of the two per cent. tax was intended to be contingent upon insurance companies being exempt from the further payment of taxes. But as we have said, the two per cent. tax is primarily for the purpose of raising necessary funds for carrying the insurance act into effect, and would have been just as necessary without exemption.—*State of Iowa v. Santee,* 111 Ia. 1; *N. W. Mut. Ins. Co. v. Lewis & Clark Co.* 28 Mont. 484.

The judgment is affirmed. *Affirmed.*

Decision *en banc.*

Mr. JUSTICE SCOTT not participating.

Decided January 24, A. D. 1913. Rehearing denied March 3, A. D. 1913.

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[No. 7900.]

## IN RE SENATE RESOLUTION NO. 4.

1. LEGISLATIVE QUESTIONS—*As to Completed Legislation*—**The duty of the court in responding to legislative questions is limited to those which relate to proposed legislation. Completed legislation is not a subject of legislative inquiry. It is not within the province of the court to advise the general assembly as to whether existing legislation upon any subject satisfies the requirements of the constitution. All departments of government are of equal dignity. Neither can declare that another has not performed a duty imposed by the constitution.**

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2. ——*Pending Legislation*—There were upon the statute books two acts relating to the hours of service of men employed in mines, smelting furnaces, and other like places, one adopted by the general assembly (Laws 1911, c. 149), and which being referred to the people, had received their approval. The other, initiated pursuant to section 1 of article V of the constitution, (Laws 1910, c. 3) assuming to repeal the former. This act also received the popular sanction. A bill was pending in the general assembly upon the same subject, substantially identical with the earlier act, repealing both the former acts and declaring that the enactment therein proposed was "necessary for the immediate preservation of the public health and safety." Upon an interrogatory from the senate as to its duty in the premises, it being fairly inferrable from the communication that it was a desire of that body to pass an act which should remove the embarrassments attending the situation so presented, *held*, that the question was within the provisions of section 3 of article VI of the constitution.

3. ——*Involving Private Rights*—Considering that private rights might have accrued under the act of 1911 or under the initiated act the court declined to express an opinion as to which, if either, was in force, or when either took effect, or as to the effect of the repealing clause in the initiated act.

4. CONSTITUTIONAL LAW—*Legislative Power*—Under the provision of the constitution (sec. 1, art. V, Laws 1911, c. 3), that "This section shall not be construed to deprive the general assembly of the right to enact any measure," the legislature may repeal even an initiated act, approved by the people. And may by declaring that a measure is "necessary for the immediate preservation of the public peace, health and safety," prevent the reference thereof to the people. Such a declaration concludes all departments and all parties, in so far as it abridges the right to invoke the referendum.

Hon. FRED FARRAR, attorney general, Mr. FRANCIS E. BOUCK, deputy attorney general, Mr. HENRY A. DUBBS, Mr. HORACE N. HAWKINS, Mr. HARRY B. TEDROW and Mr. JOHN H. GABRIEL, *Amici Curiae*.

The honorable senate, now in session, has submitted questions to this court with the request that it give its opinion upon, and answer thereto, which are preceded by a resolution, reciting, in substance, that the twelfth session of the general assembly passed an eight hour act, which was thereafter de-

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cared unconstitutional; that at the election on the 4th day of November, 1902, a constitutional amendment was adopted (section 25-a, art. V), which empowered and directed the general assembly to provide by law for a period of employment not to exceed eight hours within any twenty-four hours, except in cases of emergency, where life or property was in imminent danger, for persons employed in underground mines, or other underground workings, blast furnaces, smelters, and any ore reduction works, or branch industry or labor that the general assembly might consider injurious or dangerous to health, life or limb, and to prescribe suitable penalties for the violation of such law; that at the fifteenth session of the general assembly an act was passed, providing for an eight hour day in underground mines and underground workings, and in specified ore reduction works—Laws 1905, 284; that at the eighteenth session of the general assembly an act was passed—Session Laws 1911, 454—which declared that employment in the mines, workings, smelters and other reduction works mentioned in the title was injurious to health, and dangerous to life and limb; that the period of employment of men engaged in such workings and reduction works should not exceed eight hours within any twenty-four hours, except in cases of emergency, where life or property was in imminent danger, and prescribed a penalty for a violation of its provisions, and in express terms repealed the act passed in 1905. The act of 1911 was approved June 2, 1911. It did not contain any declaration to the effect that it was necessary for the immediate preservation of the public health or safety.

The resolution then recites that, on the 3rd day of August, 1911, and within ninety days after the eighteenth general assembly had adjourned for the session, there was addressed to, and filed with, the secretary of state a petition, purporting to be signed by the requisite number of legal voters, asking that the 1911 act be referred to the people for ratification at the ensuing general election; that thereafter, and on the

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2nd day of July, 1912, there was addressed to, and filed with, the secretary of state a petition, purporting to be signed by eight per cent. of the legal voters of the state, requesting that there be submitted to the people at the next regular general election, for adoption or rejection, a proposed measure, which was entitled the same as the act of 1911, except that instead of reciting, "and repeal chapter 119 of the Session Laws of 1905, approved March 21, 1905, and all other acts and parts of acts in conflict with this act," it recites, "to repeal all other acts and parts of acts in conflict with this act." Section 1 of this proposed act declared, in substance, that employment in all underground mines, underground workings, open cut workings, open pit workings, or directly attending the reduction works or ovens mentioned in the title, was injurious to health, and dangerous to life and limb, whenever such employment was continuously in contact with noxious fumes, gases or vapors. By the next section it was provided that the period of employment of men working in all underground mines, underground workings, open cut workings, open pit workings, or directly attending the reduction works mentioned in the title, should not, during any one month, exceed an average of eight hours within any twenty-four hours, whenever such employment was continuously in contact with noxious fumes, gases or vapors, except where life or property was in imminent danger. The act then provided a penalty for its violation, and purported to expressly repeal the act of 1905 and the act of 1911. Both these measures were published by the secretary of state and appeared on the official ballot at the general election in November, 1912, at which time, according to the certificate of the canvassing board of the state, both measures were adopted. The resolution then continues:

"And, Whereas, no proclamation was made by the governor as to the adoption or rejection of either of said two measures;

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And, Whereas, uncertainty exists in the minds of many as to the effect of said election on said act of the eighteenth session of the general assembly, approved June 2, 1911, and as to whether or not the said act is now in existence, or whether or not it has been repealed.

And, Whereas, the constitution of the state of Colorado provides, as hereinbefore quoted, that "The general assembly shall provide by law, and shall prescribe suitable penalties for the violation thereof, for a period of employment not to exceed eight hours within any twenty-four hours (except in cases of emergency where life or property is in imminent danger), for persons employed in underground mines, or other underground workings, blast furnaces, smelters; and any ore reduction works or other branch of industry or labor that the general assembly may consider injurious or dangerous to health, life or limb;

And, Whereas, a question exists as to whether or not the duty thus imposed upon the general assembly has been carried out, or whether the obligation and duty thus imposed on the general assembly still exists;

And, Whereas, the members of this session of the general assembly are desirous of performing any duty that may have devolved upon them by the constitution;

And, Whereas, there has been introduced in the present session of this house, and is now pending, an act in the words and figures following, to-wit: "Senate Bill No. 47 (By Senator Bellesfield)."

The title then recites that it is a bill to regulate and limit hours of employment in mines, specified workings connected therewith, reduction works named, and coke ovens, and to declare certain employments injurious to health and dangerous to life and limb; to provide a penalty for its violation; to repeal the eight hour law of 1905; to repeal the eight hour act submitted by initiative petition at the last November election; and to declare that the act is a law necessary for the immediate preservation of the public health and safety, and shall be

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in effect from and after its passage, and to repeal all other acts and parts of acts in conflict with it.

Section 1 of this proposed act declares that employment in the mines, reduction works and ovens mentioned in the title, is injurious to health, and dangerous to life and limb. By section 2 it is provided that the period of employment of men working in such mines or workings connected therewith, and reduction works and ovens mentioned in the title, shall not exceed eight hours within any twenty-four hours, except in cases of emergency, where life or property is in imminent danger. By section 3 a penalty is provided for the violation of the act. By the sections following it is provided that the eight hour law of 1905 and the act submitted through initiative petition at the last general election in November, 1912, are repealed, and that any adoption of the latter was annulled and should be held for naught, and that any and all other acts and parts of acts in conflict with the present proposed act of the nineteenth session of the general assembly are repealed. Sections 6 and 7 of the proposed act are as follows:

"6. It is hereby declared and enacted that this present act is a law necessary for the immediate preservation of the public health and safety."

"7. In the opinion of the general assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage."

The resolution then continues:

"And, Whereas, the constitution of the state of Colorado provides that the supreme court shall give its opinion upon important questions upon solemn occasions, when required by the senate or the house of representatives;

And, Whereas, there has been much contention, strife, agitation and controversy throughout the state of Colorado for many years over the eight hour question, and it is of the highest importance to the people that all such questions be speedily settled and determined;

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Now, therefore, be it resolved by the senate of the nineteenth session of the general assembly of the state of Colorado, that the supreme court of the state of Colorado be, and it is hereby requested, to give its opinion upon, and in answer to the following questions:

(1) Was the said act approved June 2, 1911, such an act as could be referred to a vote of the people at the November, 1912, election upon a referendum petition?

(2) If the said 1911 act of the general assembly was a measure that could be referred by a referendum petition, could there legally be submitted to the people by initiative petition at the same election another measure containing a clause repealing said 1911 act? In other words, was it legal when the 1911 act was to be ratified or rejected at the election, to also submit at said election, by initiative petition, a measure repealing, or attempting to repeal, a measure which the people were, at said election, to ratify or reject, and what was the legal effect, if any, of said repealing clause in said initiative measure?

(3) What was the legal effect of both said initiative measure and said referred act receiving a majority vote at the same election? Did both of said measures become the law, or only one of them, and if only one of them, which one?

(4) Is there now any duty devolving upon the general assembly, under the constitutional clause hereinbefore quoted, or has the duty of the general assembly been fully performed?"

This resolution and the foregoing interrogatories were accompanied by a certificate, stating that the resolution had been duly adopted by the senate, and that the proposed act mentioned in the resolution which the senate now has under consideration and is designated Senate Bill 47, has passed second reading.

*PER CURIAM.*

From the foregoing resolution, it is evident the honorable senate is confronted with an anomalous situation, from

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the fact that it appears two acts are upon the statute books upon the same subject, both, apparently, adopted, the initiated one containing a repealing clause which creates uncertainty; and that the senate has under consideration a proposed act on the same subject, which has passed second reading, the purpose of which is to take the place of both the others, and that from the questions propounded, though not directly expressed, it is the desire of the senate to pass an act which cannot be successfully attacked for any of the reasons which the first three questions impliedly suggest, provided it has authority to do so in such manner as will prevent the situation now presented from being repeated in the future. We think we are justified in deducing this conclusion from the fact that if the senate were not in doubt regarding its authority in the premises, the proposed act would be passed in due course, for by so doing the two acts mentioned would be repealed, their validity, so far as the future is concerned, no longer open to question, and in their place there would be but one act, the validity of which, on the score of its passage, would be unassailable. We think this presents the question of the constitutionality of the proposed act in particulars we shall later consider, within the constitutional provision under which the resolution and questions have been submitted, the purpose of which was to have unconstitutional legislation avoided by having the validity of proposed acts determined in advance.—*In re Senate Bill* 65, *District Attorneys,* 12 Colo. 466.

We cannot express any opinion with respect to the validity of the referred and initiated acts, which, if either, is in force, or when they took effect, or what was the legal effect of the repealing clause in the initiated measure, for the reason that both purport to be completed legislation; that under them rights may have arisen or attached which should not be determined in a purely *ex parte* proceeding; and for the further reason that, so far as the validity of legislation is involved, in response to legislative questions, it is confined to proposed acts, in order that unconstitutional legislation may be avoided,

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and cannot call for a construction of acts already passed. The results which would follow any other rule demonstrates that the validity of completed legislation cannot be made the subject of legislative inquiry; otherwise, this court, at the request of the legislative department, could be called upon to determine the validity of any number of acts which have been upon the statute books for many years, and under which rights, public and private, have attached.

That we should not determine, in any respect, the validity of the referred and initiated acts, however, does not prevent us from furnishing the information at least impliedly sought which will enable the honorable senate to clear the situation. The proposed act expressly repeals the act of 1905, and also the one initiated, and all other acts in conflict therewith. There can be no question about the authority to repeal the act of 1905. The question regarding the power to repeal the initiated and referred acts (if it can be said the latter is included in the general repealing clause) turns upon a construction of the constitutional amendment usually spoken of as "The Initiative and Referendum." That is, does this provision prevent the general assembly from repealing an initiated act, or one which has been referred? We think not, for it expressly provides: "This section shall not be construed to deprive the general assembly of the right to enact any measure." This language is broad and comprehensive. An act repealing an act is a measure, and as the general assembly is not deprived of the right to enact any measure, it clearly has the power to repeal any statute law, however adopted or passed.

The next question is, can the general assembly lawfully prevent the proposed act from being referred by the declaration contained in section 6 thereof. To answer this, reference must again be had to the constitutional provision under consideration. It provides that the power reserved designated the "referendum," "may be ordered, except as to laws necessary for the immediate preservation of the public peace, health or safety." Whether a law is of this character, is for the general

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assembly to determine, and when it so determines, by a declaration to that effect in the body of a proposed act, we are of the opinion that such declaration is conclusive upon all departments of government, and all parties, in so far as it abridges the right to invoke the referendum. Such a declaration is a part of the act, and may be passed by the majority required to pass any act, and is in no sense an emergency clause, as contemplated by article V, sec. 19.

As to the fourth question, it is not, in our judgment, within the province of this court to say whether or not the general assembly has performed the duties imposed by the constitution. All departments of government stand on an equal plane, and are of equal constitutional dignity. The constitution defines the duties of each. Neither can call the others directly to account for actions within their province; and so it follows, that the judicial cannot say to the legislative department that it has, or has not, preformed its constitutional duties. That the legislative department must determine for itself, independent of either of the other departments of government, by passing such legislation as, in its judgment, the constitution requires. The views we have expressed are simply intended to aid the general assembly in solving this important question.

In conclusion, we add that this court will always take pleasure in rendering to each house of the general assembly such assistance, under the constitutional provision by virtue of which the honorable senate has propounded the interrogatories considered, as shall be consistent with its position as a separate and independent branch of our state government, and in harmony with what is deemed a sound exposition of the constitution—the paramount law of the state.

The clerk is directed to forthwith transmit to the honorable senate a copy of this opinion.

Decision *en banc*.

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[No. 6549.]

## EVERHART v. THE PEOPLE.

1. GAMBLING—*Statute Construed*—Under section 1791, 1792 of the Revised Statutes neither the keeping of gambling devices nor playing a game is prohibited, but only gaming for money or property, or betting upon the result of a game.

A game is any sport or amusement, and includes physical contests, whether of man or beast.

Gaming is the risking of money or property on a contest of chance, skill or hazard, wherever one must win and the other lose.

Horse-racing is gaming, and a wager on the result of a horse-race is within the words of the statute, "any game whatsoever."

The statute prohibits gambling, the keeping of a place where gambling is commonly carried on, the keeping at such place, and exhibiting of gambling devices, and the betting of money or other property upon the result of any game.

Gambling devices as used in the statute include any device or apparatus kept or used for gambling.

One who, at a race meeting, had a space adjoining the grand stand, a blackboard upon which were entered the names of the horses competing, received bets upon the races, and issued cards recording the bet, upon the presentation of which after the race he paid the sums won, was declared to be guilty of keeping a gambling table, establishment, device or apparatus.

The territorial act of 1867 (Laws 1867, 114) is not a legislative construction of the statute against gambling. It simply suspended for one day in each year, at a certain place, the operation of the statutes against gambling, as to certain specified acts thereby prohibited.

2. STATUTES—*Construction*—Where identical words occur in different parts of a statute the same meaning is to be ascribed to them in each case, unless it clearly appears that a different meaning was intended, e. g., "game," "gaming," and other like words in the different sections of the criminal code against gambling are to be received in the same sense. *Corson v. Neatheny*, 9 Colo. 212, approved and followed.

3. DORMANT STATUTE—Things clearly prohibited do not become lawful by the failure, for many years, to enforce the legislative will.

*Error to Denver District Court.*—Hon. GEORGE W. ALLEN, Judge.

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Mr. T. J. O'DONNELL, Mr. EDWIN H. PARK, Mr. JOHN W. GRAHAM, Mr. JOHN A. RUSH, Mr. CALDWELL YEAMAN and Mr. J. D. BENEDICT, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, and Mr. CHARLES O'CONNOR, first assistant attorney general, for the people.

Mr. JUSTICE WHITE delivered the opinion of the court:

An information in two counts was filed against plaintiff in error, upon which he was tried and convicted. The first count was under section 1791, R. S., 1908, and charged that he "unlawfully did keep and exhibit a certain gaming table, establishment, device and apparatus, * * * to win and gain money by gambling," etc. The second count was under section 1792, R. S., 1908, and charged that he "unlawfully did play at a game for a sum of money or other property of value, and did make a bet and wager for a sum of money or other property of value, upon the result of such game," etc.

The proven or admitted facts are: that plaintiff in error made books and sold pools upon certain horse races held under the auspices of the Overland Jocky Club at Overland Park race tracks, in the city and county of Denver on a certain day. Preceding the running of each race the plaintiff in error entered the names of the horses competing in the race, upon a blackboard placed upright upon a table or platform prepared for that purpose, adjoining the grand stand at the race tracks; and, in conjunction with others employed for the purpose, received the money bet upon the races, giving in exchange therefor cards upon which was recorded the bet; and, after the result of each race, paid the sums won to the winners, upon presentation and surrender of the cards, keeping the balance,

Much of the argument of counsel is predicated upon the assumption that in order to sustain the judgment of conviction, it is essential to hold that horse racing is unlawful within the intent of these statutes. The assumption is erroneous and

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cannot be upheld. Neither the keeping or exhibiting of a gaming table, establishment, device or apparatus, nor the playing at a game is prohibited. On the contrary, such things, as far as these sections of the statute are concerned, may be done with impunity. It is only when such tables, etc., are kept or exhibited to win or gain money or property, or when the play at a game is for a sum of money or other property, or a bet is made upon the result of such game that the acts become unlawful and the doers thereof subject to punishment. Moreover, there can be a game without the element of either chance or hazard. A game is any sport or amusement, public or private. It includes physical contests whether of man or beast, when practiced for the purpose of deciding wagers or for the purpose of diversion, as well as games of hazard or skill by means of instruments or devices.—*Boughner v. Meyer,* 5 Colo. 71, 74; *Corson v. Neatheny,* 9 Colo. 212.

As defined in the Century dictionary, it is "a contest for success or superiority in a trial of chance, skill or endurance, or of any two or all three of these combined: as, a game at cards, dice, or roulette; the games of billiards, draughts, and dominoes; athletic games; the floral games. The games of classical antiquity were chiefly public trials of athletic skill and endurance, as in throwing the discus, wrestling, boxing, leaping, running, horse and chariot-racing, etc."—*Desgain v. Wessner,* 161 Ind. 205; *People v. Weithoff,* 51 Mich. 203.

A horse race, according to the weight of authority, though there are decisions to the contrary, is a game within the meaning of the statutes against gaming.—20 Cyc., p. 884; *Thrower v. State,* 117 Ga. 753; *Swigart v. People,* 154 Ill. 284.

Whether it is such within the meaning of the sections under consideration, we must now determine. In *Corson v. Neatheny, supra,* we held that a horse race was a game within the intent of section 1796, R. S., 1908, citing: *Boughner v. Meyer, supra; Talman v. Strader,* 23 Ill. 493; *Shropshire v. Glascock et al.,* 4 Mo., 536; *Boynton v. Curle,* Id. 599.

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*Boughner v. Meyer, supra,* involved the validity of a check, the consideration of which was a wager as to whether a certain execution issued upon a judgment would or would not be collected. Section 1796, *supra,* was quoted and the question propounded; "Was the consideration of the check won by any gaming within the meaning of the section above quoted?" We then said: "If the wager was upon any game, the check is absolutely void in the hands of every holder. Horse-racing had been decided to be gaming within the intent of the language here used. * * * But a wager as to whether an execution can be collected, we are constrained to conclude, cannot be considered as a wager upon any game." It was unnecessary to, and we did not determine therein, whether horse racing is a game within the meaning of that word as used in the section. We, nevertheless, declared that it had been so decided, citing *Tatman v. Strader, supra; Shropshire v. Glasscock, supra; Boynton v. Curle, supra.* But in *Corson v. Neatheny, supra,* we referred to the *Boughner-Meyer* case, and the authorities therein cited, and expressly held that horse racing is gaming within the intent of the section. That the case might have been decided exactly as it was, as claimed by plaintiff in error, does not render the holding *obiter.* The decision was based upon the applicability of the statute, and, therefore, determined that horse racing is a game, and betting thereon is gaming, within the meaning of the section.

As the section of the statute involved and construed in the *Corson-Neatheny* case affects only contracts, etc., entered into as a result of gaming, or in which the consideration was for money, property or other valuable thing won by gaming, declaring them void and of no effect, and the decisions cited therein are in civil cases, it is claimed that the rule announced and applied therein is not applicable in the construction of the criminal sections. A sufficient answer thereto is, that the alleged civil section involved and construed in that case, and the criminal sections upon which this prosecution is based, are

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embodied in, and form a part of, the same legislative act.—Session Laws 1866, p. 56; R. S. 1868, pp. 224, 225; G. L. 1877, pp. 297-299; G. S. 1883, pp. 332-334; R. S. 1908, secs. 1791, 1792, 1796.

We must ascribe the same meaning to the same words occurring in different parts of the same statute, unless it clearly appears therefrom that a different meaning was intended.—*Dixon v. People,* 53 Colo. 527; 127 Pac. 930.

This does not appear from the statute in question. On the contrary, it is clearly evident that the same words in the several sections of the act were used in the same sense, and the purpose of the law-making power was to suppress gambling, which, as used in the act, includes betting and winning money or property upon any game whatsoever. The title of the act of 1866 is, "An act to suppress gambling and gambling houses," and that law has been in no substantial respect changed or modified by subsequent legislation. We can not assume that the law-making power used the words "game" and "gaming" in a different sense in one section of the statute from that in which it employed them in other sections of the same act. In the passage of each of these sections the legislature must have had in mind the immorality of the acts and the evils resulting. Under section 1791 the party violating the provisions thereof is to be punished by fine and imprisonment; under section 1792 the offender is subjected to a pecuniary penalty, while under section 1796 certain contracts, etc., the consideration of which has arisen from the practice of the immoral and inhibited acts, are rendered nugatory and of no effect. So, in order to effectually suppress gambling, the act subjects the violator thereof to punishment and makes it impossible, upon the instruments designated, for any person to reap the fruits growing out of the acts prohibited.

But *Corson v. Neatheny, supra,* as an authority is questioned. It is claimed that this court in basing that opinion upon *Tatman-Strader, supra,* did not take into consideration the difference between the Illinois statute and the Colorado

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statute upon the subject, and that the former statute, after the word "game" uses the words "or sport" and contains other words not found in the latter statute upon which that decision could properly be based. The words "game" and "sport" are synonymous.—Webster's dictionary. Moreover, the statute under consideration in the *Tatman-Strader* case was section 1 of chapter XLVI of the Illinois Revised Statutes of 1845. We observe no substantial difference in respect to the question now under consideration between that section and section 1796, *supra,* of our own statute. If anything, the language of the latter is broader and more comprehensive than that of the former. It was not until long after the decision in *Tatman v. Strader, supra,* that the words said to be excluded from our statute, and included in the Illinois statute, appeared in either the criminal or civil sections of the statutes of that state.—Secs. 129, 130, p. 174, and sec. 1, p. 263, R. S. Ill. 1845; sec. 1, Public Laws of Illinois, 1871-72, p. 462; par. 179, sec. 131, p. 792, Vol. 1, Starr & Curtiss' Annotated Statutes, Illinois, 1885.

Counsel for plaintiff in error maintain that the history of the several legislative acts on the subject of gambling in this state shows conclusively that horse racing is not a game within the meaning thereof, and that the holding in *Corson v. Neatheny, supra,* in that regard is illogical and incorrect. We can not concur in this view. On the contrary, when we bear in mind the provisions of the several acts, their titles, nature, the history of their enactment, and the state of the law when passed, the conclusion is inevitable that the legislative intent, as the law now is, was to prevent public gambling, and includes the risking of money or anything of value between two or more persons, on a contest of either chance, skill or hazard, where one must be the loser and the other the gainer.

Our first legislation on the subject is found in the Session Laws of 1861, p. 313, under the heading: "Offenses Against the Public Morality, Health and Police," embodied in "An act concerning criminal jurisprudence." It consisted of but two

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sections. The first section on the subject, being section 112 of the act, made it a crime for any person to "deal or play at or make any bet or wager for money or other thing of value, at any of the games commonly known or called three card monte, the strap game, thimble, the patent safe game, or any other game of similar character, or shall induce, or attempt to induce, any person whatever to make any bet or wager at any such game," etc. The other section, being sec. 113 of the act, prohibited the keeper of a house, etc., to knowingly permit a person within such house, etc., "to deal or play at any of the games mentioned in the preceding section, or any game of similar character, or any game or games of cards, roulette, dice, or any other games where fraud or cheating is practiced, or where loaded dice or marked cards or waxed cards are used," etc. These sections are aimed exclusively at games and bets and wagers thereon in which an element of cheating, trickery or fraud enters, and in no sense at fair and honestly conducted games or betting thereon.

The second act upon the subject was in 1864 Session Laws, p. 96, entitled: "An act to suppress gambling and gambling houses." Section 1 thereof makes it a criminal offense for any person to keep a house, etc., "or place resorted to for the purpose of gambling, or permit or suffer any person" therein "to play at monte, three card monte, or any other game at cards, dice, faro, roulette, or any other game whatever for money or other things of value." The second section subjected any person to fine and imprisonment who should, in such gambling house or place, "play at any game for any sum of money or other property of value" or make therein a bet or wager for money or other property of value. Section 3 made all contracts, when any part of the consideration thereof was for money or other valuable things won or lost, laid or staked upon any game or bet or wager, absolutely void and of no effect.

In argument it is pointed out that in this act we find for the first time the words "any other game" associated with

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"monte, three card monte," etc., and it is impossible to conceive that horse racing or betting or wagering thereon was included within the meaning of the statute; and further, that the act does not penalize gambling generally, but only gambling and betting at a place resorted to for the purpose of gambling and the keeping of such place. Such is unquestionably the purpose of the act, and it may be that under the rule of *ejusdem generis* the gambling and games prohibited thereby are such only as belong to the class enumerated therein. Be that as it may, subsequent legislation broadened the law materially. In 1866 Session Laws, p. 56, "An act to suppress gambling and gambling houses" was adopted. The act consists of sections 1 to 12, inclusive, and as to the offenses created and the acts and things prohibited, seems to be identical with sections 1790 to 1796, inclusive, of the Revised Statutes of 1908. This act differs materially from those preceding it. The things prescribed therein are as follows: section 1, places used or occupied for gambling, the keeping of gaming tables, apparatus or establishment therein to be used for gambling and winning, betting or gaining money or other property; section 2, which is section 1791, R. S. 1908; the keeping or exhibiting "any gaming table, establishment, device, or apparatus to win or gain money or other property," and the practice of gambling; and section 3, which is section 1792, R. S. 1908; the playing "at any game whatsoever," for a sum of money or other property of value, and betting and wagering upon the result thereof. These changes in the law are significant and pregnant with meaning. Previous legislation was directed against games and bets thereon in which an element of cheating, trickery or fraud entered, and to places wherein such games and bets continuously occurred; whereas this act, being the law as it now is, is directed against all places used or occupied for gambling, the keeping or exhibiting of gaming tables, establishments, devices, etc., to win or gain money or other property, the practice of gambling and the playing "at any game whatsoever" for a sum of money or other thing of

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value, and betting and wagering upon the result thereof. There being no enumeration of specific games, subjects or things, the general words used must be ascribed their ordinary meaning. The language is plain and unambiguous. The statute does not prohibit the playing of games. It is only when they are made instruments of winning or losing money or property that a criminal character attaches to them. When we bear in mind the purpose of the act as expressed in its title, the enumerated things prescribed, it is clear that the law intends to, and does, prohibit every place commonly used or occupied for gambling of any character whatsoever, and the keeping and exhibiting of any instrumentality to be used for gambling and winning, betting or gaining money or other property upon the result of any game, and likewise the practice of gambling.

The words "gaming table, establishment, device or apparatus," as used in the statute, do not mean literally instrumentalities with appliances adapted and essential to particular games, but include any species of table, establishment, device or apparatus kept and used for gambling, winning, betting or gaining money or other property. It is the use to which the article or thing is appropriated which renders the keeping or exhibition thereof unlawful within the meaning of the sections here involved.—*Toney v. State,* 61 Ala. 1; *Estes v. State,* 10 Tex. 300, 308; *Chappell v. State,* 27 Tex. App. 310, 312; *Jones v. Okla. Ty.,* 5 Okla. 536.

"Gaming table" is said to be synonymous with "gaming house." 20 Cyc., p. 967. It means a place kept for gambling and supplied with materials for that purpose. It may include any kind of contrivance used in betting. Cyc., *supra, Garvin v. State,* 87 Tenn. (13 Lea) 162. This is made more certain by the word "establishment" used in connection therewith. One meaning of this word is, the place of business, including grounds, furniture, equipage, etc., with which one is fitted out; also that which serves for the carrying on of a business. So a device is that which is devised, or formed by design; a con-

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trivance; an invention; a project; a scheme; often, a scheme to deceive; a stratagem; an artifice. And "apparatus" means, things provided as means to some end. A full collection or set of implements, or utensils, for a given duty, experimental or operative; any complex instrument or appliance, mechanical or chemical, for a specific action or operation; machinery; mechanism.

A gaming table, therefore, consists in the essentials of the game. A table in the literal sense need not exist. A game played and something of value bet are the essential elements of a gaming table, establishment, device or apparatus as used in this act. In *Garvin v. State, supra,* Desty's Amer. Crim. Law, section 102b, is quoted as follows: "Setting up a gaming table consists in providing the essentials of the game, and a table in the literal sense need not exist, nor money or property be staked, but credit may be substituted, yet a game must be played and something bet." It is then said, page 173; "If this law is sound, and the proof shows it is, a gaming table is any place convenient for and in which the game may be played. If 'setting up a gaming table consists in providing the essentials,' and a real table is not necessary, then the room, the hall, the house or *other place* used for gaming purposes, is one of the indispensable 'essentials' of a gaming table. * * * A house, etc., could not be kept for the conduct of the prohibited games unless the tools of the game were also kept. A house, hall, or room kept for a purpose must be supplied with the materials for that purpose. As already intimated, all these combined constitute a gaming table, or gaming house, the terms are synonymous in gaming vernacular."

Applying these rules to the facts of this case, we think it is clear that plaintiff in error kept and exhibited a gaming table, establishment, device and apparatus to win or gain money or other property, and played at a game and made a bet on the result thereof for a sum of money. He had a place, to-wit: the space adjoining the grand stand, kept for gambling, and supplied with materials for that purpose, that is, the table,

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the blackboard, the slips and the horse races then run, which latter he adopted and made a part of his establishment, project or scheme. These constituted a gambling table, establishment, device or apparatus. They were the essentials of the game as devised or projected as a means to a certain end. That plaintiff in error had nothing to do with the running of the races is of no consequence. The acts and instrumentalities of others, in that respect, he adopted and thereby they became, in legal effect, his. It might well be said that his establishment, device and apparatus, that is, his gaming table, included the race tracks and the horses thereon to the same extent and effect as though they were confined to the limits of the platform upon which he stood and operated. He brought them there by adoption and made them and their acts his for the purposes of his plan of operation. He, and those participating in the pools, were, in the understanding of all, "playing the races."

As said in *Joseph v. Miller,* 1 New Mex. 621, 626: "We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case it is gambling. This is the popular understanding of the term 'gambling device' and does not exclude any scheme, plan, or contrivance for determining by chance which of the parties has won, and which has lost a valuable stake. That a horse-race, when adopted for such purpose, is a 'gambling device,' there can be no doubt." To the same effect and quoting the above language in *James v. State,* 4 Okla. Crim. Rep. 587. A horse race is a game, and selling pools or making books upon the result of a horse race is gaming, because it is betting on a game, and is unlawful, though the game itself be not unlawful. *Swigart v. People, supra,* affirming the same case in 50 Ill. App. 181.—*Edwards v. State,* 8 Lea 441; *Thrower v. State, supra; People v. Weithoff, supra; Miller v. U. S.,* 6 D. C. 6.

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In 1867 Session Laws, p. 114, the territorial legislature created a private corporation under the title, "The Ford's Park Association" which, it is claimed, constitutes a legislative construction of the anti-gambling statutes that will not permit the meaning we have ascribed to them. The objects of the association were the encouragement of stock raising and the improvement of the breed of horses within the territory. It was authorized to acquire and own a certain described tract of land; to hold thereon a horse fair once in each year; to offer such premiums and purses for horses to be exhibited and competed for, and to charge an admission to any race not to exceed $1.00 for each person. The association was required to enter and record in a book all wagers made upon any trial of speed held upon the grounds, and the act made such wagers so entered a valid and legal contract enforcible in any court of competent jurisdiction. Two and one-half per centum of the winnings of all wagers so recorded, and of the purses and premiums competed for, were required to be paid to the treasurer of the territory of Colorado by the association for the use and benefit of the Colorado Territorial Agricultural Society.

We do not think the act is in any sense a legislative construction of the gambling statutes. On the contrary, its legal effect simply suspended the operation of the gambling statutes as to certain of the inhibited acts herein, but only upon one day in each year, in a designated and limited space. In other words, it was like unto a license authorizing the doing of certain acts, at a particular time and place, which, without the license and at any other time or place, would be unlawful. Because the law-making power authorized pool-selling and book-making upon horse races occurring, at the time, upon the limited territory described in the act of incorporation, and under the control of the incorporated association, does not establish or manifest a legislative intent to authorize such acts upon like events occurring elsewhere, at other times, nor does it in any sense indicate that such acts are not within the meaning of, and made unlawful by, the statutes aforesaid, but rather that

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they are thereby inhibited. Otherwise, why grant the power to the association and place limits upon its exercise?

But it is said that prior to this prosecution, neither lawyer nor layman considered acts like those of plaintiff in error as being within the inhibition of the statutes. However that may be, it does not subtract from the legal meaning of the words used in the legislation which corresponds precisely with the historical and popular meaning. It is a matter of common knowledge that many laws are enacted which lie dormant, in whole or part, for years. We know of no court, however, that has held that things clearly within the letter and spirit of an act are excluded from the operation thereof because of such desuetude. The judgment of conviction is affirmed.

*Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 6572.]

## THE PEOPLE v. ZOBEL.

1. CRIMINAL LAW—*Accessory—Principal*—An accessory may, under Rev. Stat. 1620, be indicted and punished as a principal. The dismissal of an information as to a principal, and his discharge, does not justify the discharge of the accessory by the court of its own motion, against the protests of the district attorney. At that stage of the proceedings only the district attorney may order a discontinuance.

2. TRIAL—*Insufficient Evidence—Power of the Court. Semble* that if upon the trial of an information the evidence is insufficient to warrant a conviction the court may order the discharge of the accused.

3. ——*Writ of Error by the People*—Three were made defendants in a civil action for the value of ores alleged to have been stolen. Judgment was recovered against all. An information then pending against the same persons, for the larceny of the ores, was discontinued by the district attorney, as to two of the defendants, upon their promise to give testimony against the third, one Z. The presiding judge thereupon announced that the evidence heard in the trial of the civil action satisfied him that those as to whom the in-

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**formation had been dismissed were the real principals, and Z only an accessory, and that as the principals had been discharged the accessory could not be prosecuted; and, over the objections of the district attorney, the court dismissed the information, discharged Z, and exonerated his sureties. *Held*, in legal effect, the discharge of Z. was upon "a plea in bar" orally interposed by the court, and that a writ of error by the people lay under the statute (Rev. Stat. sec. 1997.)**

**4. ——*Judgment*—The order of the district court discharging an accused person being reversed, the cause was remanded for further proceedings according to law.**

*Error to Lake District Court.*—Hon CHAS. CAVENDER, Judge.

Hon. JOHN T. BARNETT, attorney general, Mr. JAMES M. BRINSON, deputy attorney general, and Mr. JAMES T. HOGAN, district attorney for the people.

Mr. JOSEPH W. CLARKE and Mr. T. E. MCINTYRE, for defendant in error.

The district attorney of the fifth judicial district filed an information against the defendant in error, charging him with larceny of ores. Two others were also charged with the larceny of these ores, whether in the same or other informations is not altogether clear; but that is not material. Subsequently, in the same district court in which these criminal proceedings were instituted, and before the same presiding judge, a civil action against these parties, for the recovery of the value of the ore so charged to be stolen, was tried, and a judgment rendered against them. Thereafter the criminal proceedings against defendants other than Zobel were dismissed by the district attorney upon their promise to give evidence against Zobel. Later, the district attorney made a motion to fix a time for the trial of Zobel, when the presiding judge said to the district attorney that he had already heard the evidence in the civil action, and therefore it appeared that the defendants against whom the charge had been dismissed were the principals in the crime, and Zobel only an accessory, and as the principals had been discharged by the district attorney, Zobel, as accessory, could not thereafter be tried. The judge thereupon,

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over the objection and against the protest of the district attorney, and notwithstanding the latter's statement that he had other evidence of Zobel's guilt than that produced at the trial of the civil action, dismissed the criminal charge against Zobel, discharged him, and released his bondsmen. To review this action, the district attorney has brought the case to this court for the review on error, under and by virtue of the provisions of section 1997, R. S. 1908, which, so far as material to any question involved, is as follows:

"* * * Writs of error shall lie on behalf of the state or the people to review decisions of the trial court in any criminal case upon questions of law arising upon the trial, motions to quash, demurrers, pleas in bar, pleas in abatement, motions in arrest of judgment, or where a statute is declared unconstitutional * * * provided, that nothing in this act shall be construed so as to place a defendant in jeopardy a second time for the same offense."

On behalf of the people the district attorney contends that the dismissal of the action and the discharge of the defendant were erroneous, because that step could not be taken without his consent and over his objection; while on the part of the defendant the contention is, that the question presented does not come within the purview of the section of the statute above quoted, for the reason that the dismissal was not ordered upon "questions of law arising upon the trial."

Mr. JUSTICE GABBERT delivered the opinion of the court:

It is well settled in this state, and generally, in this country, that a writ of error in a criminal case will not lie at the instance of the state unless clearly authorized by statute—*People v. Raymond*, 18 Colo. 242; *U. S. v. Sanges*, 144 U. S. 310—and the first question we shall determine, is, whether or not the section of the statute above quoted covers the case made by the facts.

It appears from the record that the dismissal of the cause was based upon facts, knowledge of which the judge obtained outside of the record in this case, which were, that because the

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proceedings against the other defendants charged with the larceny of the ores had been dismissed, and it appeared to the court from the facts established at the trial of the civil action, that they were the principals, and the defendant only an accessory, that the latter could not be tried after the discharge of his principals. In legal effect, therefore, the action of the court was based upon a plea in bar, which of its own motion it orally interposed. Such being the case, it is not necessary to define the meaning of the phrase "questions of law arising at the trial," for the reason that a decision of the court was made on a plea in bar, and that is one which the statute specifically authorizes to be reviewed in a proceeding like the present one.

In this state an accessory is guilty the same as a principal, and may be indicted and punished as a principal—sec. 1620, R. S. 1908. The mere fact that the district attorney had dismissed the proceedings against the principals did not justify the court, over his objection, to discharge the accessory. This is true, even if an accessory can not be tried after the discharge of the principal; that is, the court should not, for this reason, refuse to set a case against an accessory for trial, and of its own motion dismiss it before it had regularly been brought on for trial before a jury. It would doubtless be within the jurisdiction of the trial court, after the trial was commenced, if it appeared the evidence was insufficient, or that the law, as applied to the facts, developed at the trial, would not permit a conviction, to discharge the defendant, but, in advance of the trial, as in this case, it was not competent for the court of its own motion, and against the protest and objection of the district attorney, to dismiss the cause and discharge the defendant. At that stage of the proceedings the district attorney was the only one who could order the proceedings discontinued.—*People v. District Court*, 23 Colo. 466; *Gray v. District Court*, 42 Colo. 298.

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For the reason that in our opinion the court erred in dismissing the action, the judgment is reversed and the cause remanded for further proceedings according to law.

*Reversed and Remanded.*

Decision *en banc.*

CHIEF JUSTICE MUSSER, Mr. JUSTICE SCOTT and Mr. JUSTICE BAILEY dissent.

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[No. 6789.]

## SMITH v. DENVER & RIO GRANDE RAILROAD CO.

**RAILROAD COMPANY—*Liability for Fire Negligently Set Out—Limitation*—Section 5512 of the Revised Statutes does not create or include a liability founded upon negligence. It is cumulative to the common law. The limitation of two years there prescribed has no application to an action founded on negligence in setting out a fire.**

*Error to Denver District Court.*—Hon. CARLTON M. BLISS, *Judge.*

Mr. CARLE WHITEHEAD and Mr. ALBERT L. VOGL, for plaintiff in error.

Mr. E. N. CLARK, Mr. T. L. PHILIPS and Mr. J. T. MCMURRY, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

Henry Smith filed his complaint below to recover damages for property alleged to have been destroyed by fire negligently set out and caused (for the purposes of this case) by the defendant railroad company. It appears from the allegations of the complaint that the action was brought three years and five months after the fire occurred. To the complaint the defendant interposed, by special demurrer, a plea of the two years statute of limitations contained in the railroad fire statute. The demurrer was sustained. The plaintiff, electing to stand

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by his complaint, has brought here for review the action of the court in sustaining the demurrer, dismissing the complaint and rendering judgment against him for costs. Our railroad fire statute, sec. 5512, Rev. Stat., passed in 1903, so far as it is relevant to this case, is as follows:

"Every railroad company operating its line of road, or any part thereof, within this state shall be liable for all damages by fires that are set out or caused by operating any such line of road, or any part thereof, in this state, whether negligently or otherwise; and such damages may be recovered by the party damaged, by the proper action, in any court of competent jurisdiction; *provided,* the said action be brought by the party injured within two years next ensuing after it accrues."

The rest of the section provides that the liability imposed shall inure solely in favor of the owner or mortgagee of the property damaged or destroyed and forbids the passing of the right of action by assignment or subrogation in favor of any insurance company that has insured the property. It is the contention of the plaintiff that the action which he commenced is not the action contemplated in the statute, but is what he denominates a common law action for negligence, and that, therefore, the limitation of the statute does not apply. On the other hand, the defendant contends that the statute covers the whole law with regard to damages for fire set out or caused by the operation of railroads and that the action commenced by plaintiff is barred by the statute.

In 1874, the legislative assembly of Colorado territory passed an act substantially the same as the portion of section 5512 quoted above, except that it did not contain the words "whether negligently or otherwise," and in which the period of limitation was three years. Sess. Laws 1874, p. 225; Gen. Laws 1877, sec. 2237. In 1887, sec. 2237, aforesaid, was amended, leaving it the same as before except that there was added a provision for the appraisement of damages. Sess. Laws 1887, p. 368.

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Under the statutes, as they existed prior to the act of 1903, the liability of a railroad company for damages by fires set out or caused by operating a road was absolute and the question of negligence was eliminated. Whether the fire was set out or caused by the operation of the road and the amount of damages were the questions for determination.—*U. P. Ry. Co. v. De Busk,* 12 Colo. 294; *Garnet Co. v. Sampson,* 48 Colo. 285; *Denver etc. R. R. Co. v. De Graf,* 2 Colo. App. 42; *U. P. Ry. Co. v. Arthur,* 2 Ib. 159.

The act of 1903 is the same in this regard as the previous statutes. Under it a railroad company is unconditionally liable for damages by fire set out or caused by operating the road whether negligently or otherwise.—*British-Amer. Assur. Co. v. C. & S. Ry. Co.,* 52 Colo. 589; 125 Pac. 508.

It is plain that the words "whether negligently or otherwise," in the statute, only emphasize the absolute liability imposed, and that instead of putting negligence in the statute as an element to be considered these words exclude it. To recover under this statute, plaintiff need not allege or prove negligence. The gist of the action is the setting out or causing of the fire by operating the road. Negligence is eliminated. It is such a liability that is fixed by the statute and it is an action to recover on such a liability that is barred in two years. The action instituted by plaintiff is not such an action. He did not attempt to hold the railroad company under its statutory liability for the destruction of the property by fire set out or caused by operating the road. What he did was to institute an action to recover damages for the destruction of property by fire negligently set out or caused by the company. The gist of his action was negligence in setting out and causing the fire. He took upon himself the burden of proving this negligence. In the action instituted by him he would not only have to prove that the railroad company set out or caused the fire, but also that it was set out or caused through the negligence of the company. The complaint states an ordinary cause of action for damages occasioned by the negligence of

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a defendant. It is familiar law that he who is guilty of actionable negligence, that is the proximate cause of injury to another, may, in an appropriate action, be made to respond for the damage resulting to the injured party who is not chargeable with contributory negligence. The liability for such damage exists independent of statute, and certainly it can only be taken away, if at all, by statutory provisions that are express and clear. The statute in question does not create or comprehend a liability, founded on negligence. The statutory liability is imposed whether negligence is present or not. Certainly a statute can not take away or abolish something that it does not embrace either expressly or impliedly, nor can the limitation of a statute bar an action on a liability which the statute does not comprehend. The statute imposes an absolute liability for damages by fire set out or caused by operating a railroad, and limits the time within which an action may be begun for such damages. How can such a statute be said to include the liability of a railroad company based upon its negligence in setting out or causing a fire, or to limit the time within which an action may be begun to recover damages for such negligence? Any other person or company is liable in an action based on negligence for damages by fire negligently set out or caused. It can not be said that a statute imposing an unconditional liability for fire set out or caused in a particular manner, whether negligently or otherwise, exempts a railroad company from a liability for negligence that all other persons must endure, or that such a statute will favor a railroad company with a period of limitation not enjoyed by others who may be sued upon a like liability for negligence. It may be, though the fact does not appear from the complaint, that the alleged fire was set out or caused by operating the road. The defendant seems to treat the complaint as alleging that fact. If that was so, plaintiff, within the two years, might have begun an action to recover on the absolute liability imposed by the statute. It is not probable that within that time a plaintiff would endeavor to recover damages in an

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action for negligence that might be recovered in an action in which negligence cuts no part. That is not saying, however, that a plaintiff cannot, if he chooses, nor can a defendant complain, if he does, take upon himself the needless burden of negligence. A plaintiff can recover such damages but once. If he recovers under the statute his right of action for negligence is gone and *vice versa.* If, however, the statutory right of action is barred by the limitation of two years that fact certainly cannot bar his action for negligence when the statute does not include or contemplate a liability for negligence, nor an action to enforce such liability.

Our view of the statute of 1903 is expressed in *C. & F. Lumber Co. v. D. & R. G. R. R. Co.,* 17 Colo. App. 275, at 288, wherein our court of appeals, in speaking of the statute of 1887, said:

"In *Railway Co. v. Henderson,* 10 Colo. 2, our supreme court in construing the stock killing statute, says: 'The statute is in our judgment simply cumulative. The object of the legislature was not to interfere with the owner's existing rights, but owing to the difficulty of establishing negligence, to give him additional relief.' This language is, we think, equally applicable to the fire statute. Nowhere in the statutes, either within the fire statute itself, or elsewhere, is the slightest intent manifested to substitute this for the common-law remedy of a party, and entirely abolish the latter, and to so hold would in our opinion be a judicial assumption without authority or support."

The defendant concedes the correctness of that decision under the law of 1887, but contends, as we understand, that the addition of the words "whether negligently or otherwise," in the statute of 1903, abolished the liability for negligence and the remedy based thereon, or perhaps its contention is that these words show an intent to abolish the pre-existing remedy for negligence. As has been said, and as appears clear, these words have the effect and can serve no other purpose than to leave no doubt that the liability imposed by the

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statute exists whether the fire was caused by negligence or not, so long as it was set out or caused by operating the road, or any part of it, and they thus made no change in the statute in that respect.—*British-Am. Assur. Co. v. C. & S. Ry. Co., supra.* These words exclude negligence as an element in the doing of the act for which the statutory liability is imposed and from consideration in the use of the remedy afforded, and plainly they are not to be considered as relating to another remedy in which negligence is included as an element. In other words, their use is to exclude negligence from consideration in the liability created and the remedy afforded by the statute and not to abolish another right of action in which negligence is to be considered.

The plaintiff was, therefore, by his complaint, prosecuting a right of action to which he was entitled and which did not appear on the face of the complaint to be barred by the two years statute of limitations in question. This being so, the ruling of the court in sustaining the demurrer was wrong, and the judgment is, therefore, reversed and the cause remanded with instructions to overrule the demurrer and to proceed with the action in accordance with the views herein expressed and as the law provides.

*Reversed and remanded with instructions.*

Mr. JUSTICE WHITE and Mr. JUSTICE GARRIGUES concur.

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[No. 7355.]

## YOUNG v. THE PEOPLE.

1. PRACTICE—*Change of Venue—Application*—**An application for a change of venue under Mills' Stat., sec. 4613 (Rev. Stat., sec. 6963), must be verified by the defendant in person. An application not so verified is properly denied.**

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2. ——*Prejudice of Judge*—Where an application for a change of the venue assigns as the ground thereof prejudice on the part of the judge, affidavits expressing merely the belief of the affiant that the applicant can not have a fair trial, etc., because of the prejudice of the judge, not averring any fact upon which the belief is based, are insufficient. The requirement in the present statute that prejudice of the judge must be *shown* is of the same effect as the earlier statute by which the facts were expressly required to be stated.

3. CRIMINAL LAW—*Former Jeopardy*—Conviction of murder in the second degree. Judgment reversed for error in law. Under the constitutional provision (sec. 18, art. II,) the accused stands in the same position as if the first trial had never been had. He may be put upon trial for the highest degree of the crime.

4. ——*Instructions—Homicide—Presumptions*—On the trial of an information for wilful murder the court charged that where the homicide is committed "with a weapon calculated to produce and actually producing death, malice may be legitimately inferred, in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation, and the presumption in such case will be that the act was voluntary, and committed with malice."

*Held*, that the jury were not required to infer malice, but advised merely that such inference would be legitimate; that the question of malice was left to the jury. And the court having further charged that malice is not presumed in law, but for the jury to determine from the evidence, that it was not a subject of legal presumption, or inference, and that each fact necessary to establish the guilt of the accused must be proven beyond a reasonable doubt, by evidence of facts and circumstances consistent with the prisoner's guilt, and inconsistent with any other reasonable conclusion, *held*, that any implication that malice was to be inferred as matter of law, was removed.

5. PRECEDENTS—*Effect*—Expressions of the court upon a question incidentally presented are without authority.

*Error to Montrose District Court.*—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. T. J. BLACK, Mr. O. N. HILTON and Mr. CAESAR A. ROBERTS, for plaintiff in error.

Mr. BENJAMIN GRIFFITH, attorney general, and Mr. PHILIP W. MOTHERSILL, assistant attorney general, for the people.

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Mr. JUSTICE BAILEY delivered the opinion of the court:

This cause has been in this court once before from a judgment on a verdict of conviction of murder in the second degree, which was reversed solely on a question of law, in that it was there held that the trial court failed to properly instruct the jury upon the matter of self-defense, on which reliance was had for acquittal. *Young v. The People,* 47 Colo. 352. Upon a new trial the defendant was again convicted of murder in the same degree, and brings the case here a second time for review, alleging numerous errors. On this review the defendant raises no question of the sufficiency of the testimony to support the verdict; indeed there is no room for such claim on any reasonable basis, as the testimony is ample to support it, as it would have been had the verdict been one of murder in the first degree. The errors relied upon go mainly to questions of procedure, and relate particularly to change of venue, former jeopardy, and objections to instructions given and refused.

On October 24th, 1910, the day before the trial was to begin, according to a previous setting, counsel for the defendant filed a motion to change the venue on the ground of bias and prejudice of the judge. This motion was supported by two affidavits, identical in subject-matter and verified, respectively, by the two record attorneys of the defendant. The motion was based specifically, as shown by the affidavits, on section 4613 of 2 Mills' Annotated Statutes, and, omitting formal parts, is as follows:

"Comes now the defendant Henry Young and presents this, his motion, and moves the court to change the venue of this cause to some other court of competent jurisdiction in this county or some other county, or notify and request the judge of some other court, having jurisdiction of a like offense to try the said cause, because the said presiding judge, the Hon. Sprigg Shackleford, is so biased and prejudiced against this defendant that he cannot have a fair and impartial trial of his said cause before said presiding judge and in

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support of his said motion tenders herewith the affidavit of two credible persons not related to this defendant."

One of the affidavits was by O. N. Hilton, the other by T. J. Black, precisely alike except the name of the affiant. The Hilton affidavit follows:

"O. N. Hilton being duly sworn says on oath, that he is a citizen of the state of Colorado and has been such citizen for more than twenty years past; that the defendant above named is on trial for a felony, being a criminal cause now pending in the district court of said county, before the Hon Sprigg Shackleford, the presiding judge thereof; that it is the belief of affiant that the said defendant, Henry Young, cannot have a fair and impartial trial before the said presiding judge, the Hon. Sprigg Shackleford, because of the prejudice and bias of the said judge against the said defendant; that this affiant is not in any manner related to the said defendant Henry Young and makes this affidavit in accordance with section 4613 of Mills' Annotated Statutes of Colorado to show the prejudice of said judge against the said defendant Henry Young." Duly sworn and subscribed.

These affidavits comprise the entire showing to support the motion, which was signed by the attorneys only. Under the statute this application is insufficient, not only in form, but like wise in substance. The statute provides, among other things, that:

"Every application for a change of venue shall be by petition, verified by the affidavit of the defendant," etc.

It is at once apparent that the application does not at all comply with the statute. It is not only not signed by the defendant, but it is unverified. Verification by the defendant is a substantial requirement. By this application no sworn complaint whatever against the trial judge was presented. In the absence of a verified charge by the defendant, in substantial conformity with the statute, the application is fatally defective. Furthermore, the section of the statute on which the application is specifically based provides:

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"Third. When the judge is in any wise interested or prejudiced, or shall have been of counsel in the cause, such prejudice of the judge must be shown by the affidavit of at least two credible persons not related to the defendant."

How can it be fairly said that the prejudice of the judge has been shown when the only allegation is the bare statement of a belief that the defendant cannot have a fair and impartial trial, because of the prejudice and bias against him of the presiding judge? There is no showing of fact which discloses that any such prejudice or bias actually exists. The mere expression of a belief that the judge would not give the defendant a fair and impartial trial, without the statement of a single fact upon which such belief is based, is in no sense a compliance with the requirements of the statute, that the prejudice of the judge must be shown. It would be a travesty upon justice, and in direct conflict with sound common sense to permit such a showing to effect a change of venue in a criminal cause under such a statute. It has been the policy of this state from the earliest times to require the disclosure of sworn facts showing the prejudice of the judge, and such facts must be sufficient to require the change. Under early statutes upon this subject there was a specific requirement that the facts showing the prejudice be set forth in the application, and the affidavits filed in support thereof. The requirement under the present statute, that the prejudice of the judge must be shown, is equivalent to that contained in the earlier ones.

In the case of *Solander v. The People,* 2 Colo. 48, this court, passing upon an application for change of venue for prejudice of the judge, said:

"It is plain that the petitioner must now set forth in his petition the ground upon which the venue may be changed, as, that the judge or the inhabitants of the county are prejudiced against him, and also the facts which lead to the belief that such ground exists. Affidavits may be filed to show the truth of these facts, and if the ground upon which the change

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is asked sufficiently appears, the prayer of the petitioner will be granted; otherwise it should be denied.

In support of the allegation that the judge was prejudiced against her, petitioner averred that she had heard that the judge had expressed the opinion that she was guilty of the crime charged, and that, at a former term of court, he had tried to prevent her from procuring bail in the cause. The mere statement that she had heard such rumors, there being no averment as to the truth of them, may be dismissed without comment."

In *Mullin v. The People,* 15 Colo. 437, speaking to this proposition, under the present statute, it was said:

"In some jurisdictions, when a change of venue is asked on account of the prejudice of the presiding judge, it is not necessary to set forth in the petition the fact or facts on which the party bases his fears that he will not receive a fair trial in the court wherein the cause is pending. But in this state such facts must be stated, although with not the same particularity as is required in cases in which the application is based upon the alleged prejudice of the inhabitants of the county."

Our own authorities seem clear upon this point and we need not look elsewhere. The reason for such requirement is obvious, else the mere filing of an application and affidavits simply expressing a belief that, because of the bias and prejudice of the judge, a fair and impartial trial could not be had, would work a change of venue in any criminal cause. The statute is incapable of any such construction; its plain meaning is to the contrary. The hardship, delay and impossibility of bringing offenders to justice in many cases, if the venue mught be thus readily and easily changed, is manifest. The motion was properly denied.

The defendant was convicted upon the first trial of murder in the second degree, on an information charging first degree murder. On writ of error from this court, the judgment entered on that verdict was reversed for failure of the trial

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court to fully instruct upon the subject of self-defense. On a second trial the defendant was again convicted of murder in the second degree, the trial having been conducted as though no previous trial had been had. The claim is that having been once convicted of second degree murder, the defendant was by the verdict acquitted of first degree murder, and on a second trial could not be put in jeopardy of punishment for a crime higher in degree than that of which he was first convicted.

By section 18 of article II of the constitution of the state, it is provided:

"That no person shall be compelled to testify against himself in a criminal case nor shall any person be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy."

This provision of the constitution needs no construction; it is as plain and clear as language can make it. It means: First. If the jury disagree, that the accused may be tried again upon the charge as if no trial had been had; Second. If the judgment be arrested after the verdict, for any reason, that the defendant shall be deemed not to have been in jeopardy, and may be again tried as originally; and Third. If the judgment be reversed for error in law, that then the defendant shall be deemed not to have been in jeopardy, and may be again tried under the information, upon every charge contained in it. If the defendant in this case had not been in jeopardy, and such is declared to be the fact upon the record, by this provision of the constitution, the former judgment having been reversed for error in law, then he could be lawfully tried for and convicted of the highest degree of crime contained in the charge. Upon a reversal of a conviction for error of law, under this provision, one accused of murder stands as though there never had been a former trial; his second trial is *de novo*. The same presumption of his innocence

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of any degree of unlawful homicide, although he has been convicted of one degree thereof, prevails as upon the first trial. The accused stands upon a second trial as though the former trial had never taken place, and the state stands in precisely the same position. This is the evident purpose and intent of the framers of our constitution. Unless it be assumed that the criminal laws are designed to facilitate the escape from just punishment of those charged with offenses, instead of for the protection of society through punishment of those who violate its laws, the above interpretation must be accepted as correct.

The argument advanced in the cases cited in behalf of the defendant in support of his position of former jeopardy, is that a conviction of a lesser degree of homicide is an acquittal of all higher degrees of that crime. This is undoubtedly true so long as that conviction stands, for no one should be twice punished for the same offense. But where, as here, such conviction has been set aside, on review, for error in law committed by the trial court, then by the constitutional provision under consideration the implied acquittal of the higher offense charged in the information is completely overthrown.

It is to be noticed that section 18 of article II, above quoted, upon the question of former jeopardy, differs widely from corresponding provisions found in the constitutions of those states where the doctrine is held that one convicted of murder in the second degree, under an information charging murder, cannot, on a new trial, be tried for a greater degree of crime than that of which he was first convicted. The constitutions of states so holding simply have the provision, in substance, that no person shall be twice put in jeopardy for the same offense. They do not have the further provision, found in our constitution, that if the judgment be reversed for error in law the accused shall not be deemed to have been in jeopardy. For this reason the cases from the various states, holding as above indicated, are not in point in deter-

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mining the question of former jeopardy under a constitutional provision such as ours.

Several of the states have either constitutional or statutory provisions in effect like the one now before us, and in those states it has been uniformly held that upon a new trial the accused cannot plead former jeopardy, though the first trial resulted in a conviction of a degree of crime less than the highest one contained in the charge. The constitution of Georgia provides:

"No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his or her own motion for a new trial after conviction, or in case of mistrial."

The case of *Waller v. State,* 104 Ga. 505, was determined under this provision. In that case Waller was indicted for the offense of murder, put upon trial and convicted of that offense. He moved for a new trial, and when this motion was denied, took the case to the supreme court, where the judgment was reversed and a new trial granted. He was again tried in the lower court and convicted of voluntary manslaughter, and the judgment upon that verdict was also reversed and a new trial awarded. Upon a third trial, when arraigned in the lower court, he filed pleas setting up that he had been acquitted of the crime of murder by the verdict of the jury pronouncing him guilty of voluntary manslaughter, and could not therefore be again put in jeopardy on an indictment of murder, and submitted himself for reindictment for voluntary manslaughter. This plea was overruled and Waller convicted of voluntary manslaughter. He once more took the case to the supreme court for review of the question of former jeopardy. In the course of its opinion on this proposition, the supreme court of that state said:

"Prior to the constitution of 1865 all of the constitutions of this state had read, in regard to this matter: 'No person shall be put in jeopardy of life, or liberty, more than once for the same offense.' Under the same or a similar provision

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many courts had held that a person who had been tried for murder, and convicted of a lower offense, was by the verdict acquitted of the higher offense and could not be again put upon trial for it. When the constitutional convention of 1865 met and organized, Charles J. Jenkins was appointed chairman of the committee to draft a new constitution. He was at that time a member of the supreme court of Georgia, and had served for several years. Judge Jenkins had doubtless read the various opinions of the courts and text-writers upon this question; and in order to put the question at rest in this state, he added to the provision of the older constitutions the words: 'save on his or her own motion for a new trial after conviction, or in case of mistrial.' This addition was adopted by the convention * * * and forms part of our present constitution. If, prior to its adoption, the accused had the absolute right to which many of the decisions above referred to held him entitled, this right has since that time existed only in a modified form. The state said to the accused: 'If you are indicted for a major offense and convicted of a minor, and a new trial is granted upon your own motion, you may be a second time tried for the major offense. * * * The state, for the purpose of protecting society against crime and criminals, reserved the right to place more than once upon trial for the same offense persons accused of crime who had upon their own motion been granted new trials. Waller made this motion for a new trial and obtained it with a knowledge of this constitutional provision. He therefore can not complain of his having been again put upon trial for murder, although the jury may, in the other trial, have found him guilty of manslaughter only."

The Missouri constitution provides:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life of liberty; * * * and if judgment be arrested after verdict of guilty on a defective indictment, or

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if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

In *State v. Simms,* 71 Mo. 538, considering the question of a plea of former jeopardy under that provision, the court said:

"As this cause will be remanded, it may be well to observe that sec. 10 of art. XIII of the constitution of 1820, which provides that 'no person having once been acquitted by a jury can, for the same offense, be again put in jeopardy of life and limb," * * * and under which the case of the *State v. Ross, supra,* was decided, has been materially changed by section 23, article II of the constitution of 1875, by the addition to what has been copied of the following words: 'And if judgment be arrested after verdict of guilty, on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law.' The change thus made in the said section overthrows the rule laid down in the case of the *State v. Ross, supra,* that a person who is indicted for murder in the first degree, if tried and convicted of murder in the second degree, which judgment is reversed for error in law, cannot on a second trial be tried for murder in the first degree. They are equivalent to declaring that when such a judgment is reversed for error at law, the trial had is to be regarded as a mis-trial, and that the cause when remanded is to be tried anew, and when remanded, that it is put on the same footing as to a new trial as if the cause had been submitted to a jury resulting in a mis-trial by the discharge of the jury in consequence of their inability to agree on a verdict. It is difficult to conceive what other construction can be given to the words added to said section."

In *State v. Billings,* 140 Mo. 193, speaking to this proposition, it was said:

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"It was held in *State v. Ross,* 29 Mo. 32, that one indicted for murder in the first degree, and put upon his trial, and convicted of murder in the second degree, and a new trial granted upon his application, could not legally be put upon trial again for murder in the first degree. But by article II, section 23, constitution of Missouri, that decision is no longer law in this state. A defendant convicted of murder in the second degree under an indictment for murder in the first degree may now be awarded a new trial, and, when granted, he may be again put upon trial for murder in the first degree."

In some states there is a statute which has the same effect as our constitutional provision, most of which are substantially in the words of the Indiana statute, which provides as follows:

"The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument."

In *Veatch v. State,* 60 Ind. 291, in reference to a reversal of a conviction for manslaughter under indictment charging murder, on plea of former jeopardy of the higher grades of the offense charged, the supreme court of Indiana had this to say:

"On the trial, the defendant offered in evidence the record of the former conviction in the cause, 'as proof of his former acquittal of murder in the first and second degrees, and for no other purpose,' but the evidence was excluded.

The theory of the appellant is, that the former verdict, which was for manslaughter only, operated as an acquittal of murder in either of its degrees; and that, upon a subsequent trial, he could not be convicted of murder in either degree. The constitution, it is true, provides, that 'No person shall be put in jeopardy twice for the same offense.'

But there are many cases in which this constitutional provision is deemed to have been waived. Thus, if one is convicted of an offense, and obtains a new trial, either in the

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court in which the case is tried, or on appeal or writ of error, he is deemed to have waived the constitutional provision, and may, of course, be put upon trial the second time for the same offense, and so on as often as he obtains a new trial. The statute regulating criminal pleading and practice provides, that 'the granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument.' 2 R. S. 1876, p. 408, sec. 141.

Now, it would seem, that, if a party takes a new trial in a criminal case, he takes it on the terms prescribed by the statute, and consents to be placed 'in the same position as if no trial had been had.' If this is so, where a party has been tried on an indictment for murder, and convicted of manslaughter, and has obtained a new trial, he may, upon the new trial, be convicted of murder; for, by obtaining the new trial, he consented to be placed in the same position as if no trial had been had. But, however this may be, the appellant was not injured by the rejection of the evidence, for he was not convicted of murder, but of manslaughter only."

In the case of *Ex Parte Bradley,* 48 Ind. 548, the supreme court of that state, discussing the question of former jeopardy at considerable length, under both the common law and the statute quoted above, upholds the rule that where the accused is convicted of murder in the second degree or manslaughter under a charge of murder, and secures a reversal of that judgment, he may be again tried for murder in the first degree. In *People v. Palmer,* 109 N. Y. 415; *Commonwealth v. Arnold,* 83 Ky. 1; *Briggs v. Commonwealth,* 82 Va. 554; and *State v. McCord,* 8 Ka. 232, the same rule is announced, all under statutes substantially like that of Indiana. *In re Somers,* 31 Nev. 541, a case under a statute similar to those above referred to, the supreme court of that state, reviewing at considerable length the authorities relative to former jeopardy, overruled the contention of the defendant, that upon

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a new trial brought about by his own application he could not be tried for a higher degree of the offense than that of which he had been convicted.

It becomes unnecessary, as already indicated, to consider or comment on the many cases from various states announcing a different rule, where the sole provision for consideration is in effect that no person shall be twice put in jeopardy of life or liberty for the same offense, since such decisions can have no application to a like question, considered under the peculiar provisions of our constitution on this subject.

In several states, however, the rule is upheld that, upon a new trial, a previous conviction having been set aside, the plea of former jeopardy of the higher grades of the offense charged than the one on which conviction was had, is unavailing, even without the aid of a constitutional provision such as ours, or statutory provisions similar to those heretofore considered, notably, in South Carolina, in *State v. Gilles,* 73 S. C. 318; Ohio, in *State v. Beheimer,* 20 Ohio State 572; Utah, in *State v. Kessler,* 15 Utah 142; Nebraska, in *Bohanan v. State,* 18 Neb. 57; Oklahoma, in *Turner v. Territory of Oklahoma,* 15 Okla. 557; and Vermont, in *State v. Bradley,* 67 Vt. 465.

In *Trono v. United States,* 192 U. S. 521, the United States supreme court definitely declared the same doctrine. In that case the rule announced in *People v. Palmer, supra,* was specifically approved, and the statutory provision in New York, there under consideration, that 'the granting of a new trial places the party in the same position as if no trial had been had, and when a new trial is ordered it shall proceed in all respects as if no trial had been held,' was declared not to contravene the constitutional provision that no person shall be twice put in jeopardy for the same offense. The doctrine of the *Trono* case was reaffirmed in *Flemister v. United States,* 207 U. S. 372. If, by statutory provision, a defendant may upon a new trial be lawfully held to answer

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to a higher degree of an offense than that of which formerly convicted, then certainly it is competent to so provide by a constitutional provision.

It is urged by counsel for the defendant that by previous opinions of this court a different rule from the one here stated has been indicated. It is sufficient to say that never before has this court been called upon to directly consider or determine this question, and anything which may have been heretofore said, indicative of a view contrary to that here declared, was purely incidental, and in cases where that question was not properly before the court for determination. Such expressions are, therefore, in no sense authority upon the proposition.

Of the instructions of the court, it is complained generally that at this trial instructions were again given which had been condemned in our former opinion, and that some which had been expressly approved were not given. A careful inspection of the record fails, in any true sense, to support these contentions. Of the three instructions, which it is claimed were condemned in the former opinion, *Young v. People, supra,* this court spoke as follows:

"The first instruction is the statutory definition of justifiable homicide, and the other two are mere negative instructions, given on behalf of the people, specifically pointing out certain conditions, circumstances and situations, under which the defendant may not avail himself of that defense. They do not purport to state the law of this subject *in extenso,* or with any degree of fulness. They were entirely proper for the purpose intended, but under the conflicting testimony, touching the facts immediately surrounding the homicide itself, the defendant had a constitutional right to have a lucid, accurate and comprehensive statement by the court to the jury of the law on the subject of self-defense from his standpoint, upon the supposition that the jury might believe, and accept as true, his testimony, and that of his witnesses, explanatory of the encounter which resulted in the death of Wilkinson."

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From the foregoing it is apparent that these instructions were not condemned. They are declared to be entirely proper for the purpose intended. It was there further held, in substance, that the defendant was entitled to have affirmative instructions covering the law of self-defense from his standpoint, which were not given, and it was solely because of the failure to so further instruct that the former judgment was reversed and the cause remanded. It is plain that if upon the former trial the court had, in addition to those instructions, given instructions embodying the defendant's right to act upon appearances, even though such appearances may have been deceptive, and also covering generally the rights of one claiming to act in self-defense, then the charge which contains these instructions would not have been a proper subject of criticism. On page 300 of the opinion in the former case, this court quoted two instructions, numbered one and five, which were requested by the defendant on the first trial and refused by the court, stating the law as to the rights of the defendant relative to self-defense as announced in the opinion of the court, at page 355, where it is said:

"It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one's right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that actual danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity."

In the former opinion the court did not specifically direct that these instructions, numbered one and five, should have been given. What it did say, at page 361 of that opinion, was this:

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"While we do not say that these particular instructions should necessarily have been adopted, what we do say is, that under the facts it is clear that proper instructions, either like those requested or their equivalent, covering the defendant's right to act upon appearances, that actual danger is not indispensable to warrant one acting in self-defense, and that the defendant, acting as a reasonable person, had a right to judge for himself of the danger, should have been given. A single instruction covering this entire phase of the case could easily have been framed by the court for the jury."

The inquiry of the court will now be directed, not to the question as to whether these specific instructions were given, as there was no direction that they should be, but as to whether the court did in fact give instructions upon the law of self-defense, such as the defendant was entitled to have, and while it is asserted by counsel that no such instructions were given, the record discloses the fact to be precisely the contrary. Instructions numbered nineteen and twenty-five, respectively, requested by the defense at the trial, were given, and fully and accurately state the law upon this subject. They were quite as favorable to the defendant as were instructions numbered one and five, which this court approved. It satisfactorly appears from the whole record that all of the rights of the defendant on his theory of the case upon the law of self-defense, under the evidence adduced, were fully protected by the instructions of the trial court in the present case, in strict compliance with the suggestions of this court in its former opinion.

Instruction number four, given by the court, reads as follows:

"The jury are instructed that when the killing is done with a deadly weapon, or weapon calculated to produce, and actually producing death, malice may be legitimately inferred in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation or cause, and the

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presumption in such case will be that the act was voluntary and committed with malice aforethought."

This is vigorously attacked as invading the province of the jury, for failure of the court to say that such presumption only obtains where the killing has been shown to have been deliberate and unlawful. The words, "in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation or cause," characterize the killing as unlawful, and clearly, as we think, leaves the question as to whether malice had been shown as one of fact for the jury, upon the whole testimony. If testimony was adduced showing or tending to show necessary self-defense, or sufficient provocation or cause for the act, then, under this instruction, the jury was free to reach a conclusion upon the question of malice from all of the facts and circumstances before it. It was only in the entire absence of testimony showing or tending to show necessary self-defense, or sufficient provocation or some cause which justified or explained the act, that the jury was permitted, if they should see fit from all of the facts before them to do so, to draw the presumption of malice from the use of the weapon to which the instruction referred. They were not instructed that they should draw such a conclusion, but advised merely that it would be legitimate to do so under the circumstances and conditions suggested. So that the question of malice after all was left to the jury to determine from the testimony as a fact. In other words, if the instruction had said, where the killing is unlawful, and done with a deadly weapon, malice may be implied, that clearly would have been been proper; and in the present case we are of the opinion that the words of limitation used in the instruction given are equivalent to the use of the word unlawful, to describe the character of the killing referred to in the instruction. Furthermore, the jury were instructed upon the question of malice as follows:

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"The court instructs the jury that malice is not a presumption of law, but a fact for the jury to determine from the evidence, under the instructions of the court."

The jury were also instructed upon the question of intent in this language:

"The court instructs the jury that the intention of the accused at the time of the killing, is to be ascertained by the jury upon the evidence, and cannot be made the subject of legal presumption or inference."

And further, the court, having theretofore instructed the jury that malice was one of the essential elements to be found from the testimony in order to convict the defendant of the crime of murder, instructed as follows:

"The court instructs the jury that to warrant a conviction, each fact necessary to establish the guilt of the accused must be proven by competent evidence beyond a reasonable doubt, and the facts and circumstances proven should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion."

These instructions are sufficiently explicit upon the question, that malice was a fact to be proven and determined as a fact by the jury, to remove any implication, in the instruction of which complaint is made, that the jury should as a matter of law infer malice or intent to kill from any particular or special fact or circumstance. Furthermore, this precise instruction has been specifically approved by this court in its opinion in the case of *May v. The People,* reported in 8 Colo. 210, where it, with other instructions quoted, is characterized as follows:

"The court gave the jury twenty-six instructions, sixteen of which were upon the court's own motion, the other ten upon the motion of the counsel for the prisoner; and for the reason that, in my opinion, these instructions furnish in themselves better proof of their correctness, lucidity and comprehensiveness in their application to the facts of the case, and under our statutes relating to murder and manslaughter in

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force at that time, than could be made by any discussion of them simply with reference to the verdict complained of, they are inserted here in full."

Repeatedly throughout the instructions the court directed that the jury should make their findings upon the testimony in the case, and particularly directed the jury to treat and consider the instructions as a series, that no one instruction stated all the law, but that the instructions were to be taken and considered together as the law in governing the jury in applying the law to the facts. The jury could not have failed to understand, from all of the instructions, that they were to determine the character of the killing, the question of justification, and all the necessary elements to determine the guilt or innocence of the defendant from all of the facts and circumstances disclosed by the testimony, taken and considered as a whole. From a complete survey of the record, including all testimony introduced and instructions given, we have no hesitancy in reaching the conclusion that the giving of instruction number four was not misleading, and that no prejudicial error was occasioned thereby.

The refusal of the trial court to give certain instructions asked on behalf of the defense is urged as a ground of complaint. There was no error in such refusal, since every proposition sought to be covered by those instructions was fairly covered by the instructions which were given, and this court has repeatedly declared that it is not error to refuse to give instructions which are merely cumulative.

It is further urged that the testimony of Gass, Taylor and Pitts, taken at the former trial, was improperly introduced in evidence at this trial. The testimony taken showed that the witness Gass was absent from the state, located in Missouri, beyond the jurisdiction of the court, and that the witnesses Taylor and Pitts were dead. The questions of whether the absence of Gass from the state, and the death of the witnesses Taylor and Pitts had been satisfactorily established, was primarily a matter for the trial court, and that

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court having held that these matters were sufficiently shown, such finding will not be disturbed if it is fairly supported by the testimony. Upon this subject we have carefully examined the record, and are satisfied that the findings of the court in this respect are supported by clear and convincing testimony. When these facts were established, then the testimony taken at the former trial, preserved and identified by bill of exception, was clearly competent in evidence at this trial. The contention is made that this testimony was introduced from stenographic notes. The record does not support this claim. On the contrary, it was from the bill of exceptions, made a part of the record at the former trial and used in this court upon review of that judgment, that the testimony of these three witnesses were read into the present record. That testimony was duly authenticated, certified and sealed by the trial judge, as being all of their testimony introduced at the former trial, both on direct and cross examination. The bill of exceptions was further identified by the official stenographer, who also testified that it contained all the testimony of these three witnesses adduced, offered and received at the first trial. It was therefore properly received.—*Rico R. & M. Co. v. Musgrave,* 14 Colo. 79; *Emerson v. Burnett et al.,* 11 Colo. App. 86; 16 Cyc. 1088, 1096 and 1097, subject Former Evidence.

Other errors are assigned, which we have carefully examined. They are without merit and need not be further considered or discussed. Upon the whole record, we are convinced that the defendant had a fair and impartial trial, that the verdict was fully warranted under the law, upon the facts shown, and that the judgment upon the verdict is a just and proper one, which should not be disturbed.

*Judgment affirmed.*

Decision *en banc.*

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[No. 7441.]

## BURCHMORE v. ANTLERS HOTEL CO.

1. EVIDENCE—*Relevancy*—Action for an injury occasioned by the collapsing of a chair provided for plaintiff in the dining-room of defendant's hotel, where plaintiff was a guest. There were many chairs in the same room, some like that offered to plaintiff, others of different style, structure, and fashion. The particular defects in the chair provided for plaintiff were not shown. Testimony as to the alleged defective condition of other chairs in the dining-room, and other accidents occurring there prior to plaintiff's injury, was held irrelevant to the issue.

2. INSTRUCTIONS—*Assuming a Fact in Issue.* In an action for an injury attributed to a defective chair negligently provided for plaintiff, a guest in defendant's hotel, an instruction which permitted the jury to find for the plaintiff, if the chair was defective, and defendant "*had it used reasonable care*" would have known of the defect, even though it had no actual notice thereof, is properly refused, because assuming a want of reasonable care on the part of the defendant.

3. ——*Objections and Exceptions To*—The rule prescribed in *Hasse v. Herring*, 36 Colo. 383, has no application to an instruction which contains but one proposition of law, and the objection calls the attention of the court to that particular proposition; nor to a case where each of several instructions contains a single proposition and objection is made to each separately, e. g., where in an action for an injury attributed to the negligence of defendant an inn-keeper, in providing for plaintiff a defective chair, an instruction which imposed upon plaintiff the burden to establish "that defendant invited plaintiff to sit in a chair which was unsafe and out of repair and known to defendant" to be so, prior to the happening of the accident and that the injury was "the natural and probable result of such negligent act of defendant" was held to present only a single proposition, to which a general objection was sufficient.—*France v. Goryot*, 30 Colo. 227, and *National Fuel Co. v. Green*, 50 Colo. 307, distinguished.

4. NEGLIGENCE—*Reasonable Care*—An inn-keeper invites his guest to occupy a chair, which by reason of its defective condition collapses, precipitating the guest to the floor. The inn-keeper is liable if by reasonable care he would have known of the defect, even though he had no actual knowledge thereof.

5. PLEADINGS—*Construed*—Complaint for an injury attributed to the negligence of defendant, an inn-keeper, in providing for plain-

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**tiff, a guest at his hotel, a defective chair, alleged that the defect was "known to defendant," before and at the time, etc. *Held*, to admit evidence that the defendant would have known of the defect, if reasonably diligent.**

*Error to El Paso District Court.*—Hon. W. S. MORRIS, Judge.

Mr. JOSEPH N. BAXTER, Messrs. VANATTA & DOLPH and Mr. ROBERT E. HARDING, for plaintiff in error.

Mr. WM. E. HUTTON and Mr. BRUCE MCCOY, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action upon the part of the plaintiff in error, plaintiff below, to recover damage for injuries alleged to have been received while a guest of the Antlers hotel at Colorado Springs, conducted and operated by the defendant corporation. The plaintiff was a resident of the city of Boston, Massachusetts, and was one of a party of about one hundred and seventy-five making a tour across the country. The party, including the plaintiff, stopped at the city of Colorado Springs and became guests of the said hotel.

Presumably because of so large a party to be cared for at one time, the hotel management provided one of its dining rooms, partially, with certain camp chairs. The plaintiff on the evening of the second day at the hotel, entered the dining room in company with two friends, husband and wife, and were being seated at the same table. The plaintiff while being seated, and while assisted by a waiter, sat down on the chair provided for her, and it immediately collapsed, participating the plaintiff to the floor, causing the injuries alleged to have been sustained. The particular chair in question is described as a folding camp chair, with perforated wood back and seat. The other chairs were as hereinafter stated, and at least a part of them were camp chairs, and presumably of the same description.

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The allegation in the complaint as to negligence is that the defendant "neglectful of its duty, carelessly, negligently, knowingly, recklessly, wantonly and maliciously invited the plaintiff to the use of a chair which was unsafe and known to be so by the defendant company."

The answer is a general denial, and also charges contributory negligence. As to what was the character or nature of the defect in the chair used, is not clear, in fact this appears to be purely speculative. The cause was tried to a jury and a verdict returned for the defendant.

The assignments of error are: (a) the refusal of the court to admit certain testimony; (b) the refusal to submit to the jury an instruction tendered by the plaintiff, and (c) the giving of other instructions by the court over the objections of defendant.

The testimony refused was as to the condition of other chairs in the dining room prior to the accident, and as to other accidents occurring in the dining room prior thereto. No testimony was offered as to the particular defect in the chair used by the plaintiff, and the same seems to have disappeared and could not be produced at the trial.

Plaintiff cites many cases wherein testimony is admitted as to the prior condition of the particular object or thing, causing the accident, and also of other and prior accidents occasioned thereby, but in no case cited, does it appear that such testimony was admitted as to the condition of similar objects or things in the same vicinity, or as to previous accidents occasioned by similar objects or things, not related to the object which was the direct cause of the accident.

The testimony discloses that the chairs in the dining room were not all of the same make or design, or of similar defective condition, but on the contrary, that some were solid framed, some cane bottomed, and others of the type of the chair in question. Hence, it cannot be justly reasoned that a defect in one should give notice to the defendant of a dangerous condition in the particular chair in question. It is true

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that in cases where the specific defect is of such a character that the general condition, as in case of a sidewalk, would naturally draw attention to the precise defect complained of, that such general condition is sometimes admitted.—*Lyons v. Grand Rapids,* 121 Wis. 609.

But the condition of one particular chair in a large dining room could not be expected to give notice of the condition of any other one chair, though if such defective condition was known to be general with the chairs used, it might be permissible as tending to show a prudent duty upon the part of the landlord to examine all of them. The rule in this respect as stated by Wigmore on Evidence, is "that the prior injury or defect should be one which, if known, would naturally warn the person charged of the existence of the defect in question. It should be so closely associated with the one in question that the discovery of the one would naturally lead to the discovery of the latter, or would warn of its existence."

It is said in *R. G. S. Ry. Co. v. Campbell,* 44 Colo. "In an action for negligence the general rule is that evidence of other independent and disconnected acts of negligence, which could not have contributed to the plaintiff's injuries, is not admissible to establish the negligence charged."

The testimony complained of was properly excluded. That part of the instruction complained of as having been refused by the court is as follows:

"And if you find that the defendant, *had it used reasonable care,* would have known of the defect in the chair provided for plaintiff, if you find the same was defective, it would be liable in this action, although it had not actual notice of the defect."

The law in this respect is reasonably well stated in other instructions and the expression "had it used reasonable care," would appear to be an assumption upon the part of the court that the defendant did not use reasonable care. We see no error in the refusal of this language as an instruction.

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The objection as to instructions given and numbered 3, 4, 7 and 10, is of more serious concern. It is contended by the appellee that we may not consider these several instructions on appeal, for the reason that sufficient and proper objections and exceptions were not made at the time. The defendant in error cites *Hasse v. Herring,* 36 Colo. 383, in support of this contention and wherein it is held: "When one instruction contains two or more independent and distinct propositions of law, one of which is right and another, or the others wrong, a general exception directed to the whole instruction will not entitle the party to be heard as to that portion of the instruction, which he deems to be wrong." This must be regarded as the rule of this court not only at the time of the decision in that case, but before and subsequent. But it cannot be the rule where the instruction contains but one proposition of law; for a specific objection to a single legal proposition is all that can be reasonably asked, and the objection is sufficiently specific if it calls the attention of the trial court to that particular proposition. In the present case the objection was made to each instruction separately and not as one general objection to all instructions. An examination of the instructions complained of makes it clear that neither one of them contains more than one proposition of law, and that each of them are subject to the identical criticism. Instruction No. 7 is as follows:

7. "The court instructs the jury that the burden of proof is on the plaintiff to establish by a preponderance of the evidence that the defendant invited the plaintiff to sit in a chair which was unsafe and out of repair, *and known* by the *defendant to be unsafe and out of repair prior to the happening of the accident complained of,* and that the injuries occurring to the plaintiff were the natural and probable consequences of such negligent act on the part of the defendant."

This purports to set forth certain prerequisite determinations of fact in order to lawfully establish by proof, the question of negligence under the law, as applicable to the case. It

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is not possible to conceive of more than the one legal proposition in this statement. In *France v. Geryot,* 30 Colo. 227, cited by counsel, it was said:

"It has been held by this court that a general exception to an instruction which contains more than one proposition of law, is not an exception which entitles the party to have the alleged error reviewed in this court."

In that case there was but the one general objection to all instructions, including those admittedly good, so that the court was not even advised as to the specific instruction, or instructions, relied on as being erroneous.

*National Fuel Co. v. Green,* 50 Colo. 307, also relied on by counsel, does not sustain their contention in this case, for there the instruction to which objection was made, contained three distinct propositions of law, each relating to a different item of damage involved in the case; viz.: damages to be allowed during plaintiff's minority, damages subsequent thereto, and damages on account of expenses incurred, in each of which a different rule of law obtained as to measure of damage.

It was not intended to be the rule of this court that an objection should embrace an argument, but rather that the attention of the court should be called to each particular legal proposition objected to. Holding therefore, as we do, that the instruction now being considered, contained but one legal proposition, the objection thereto as stated, was sufficient. It is not seriously contended by counsel for defendant that the instruction correctly states the law, if the pleadings are sufficiently broad to cover a proper statement of the law in that respect. The objection to the instruction is that it holds the defendant liable only in case of actual knowledge, for it declares "and known by the defendant to be unsafe and out of repair," thus overlooking the legal proposition as to the duty imposed on the defendant in such cases in the matter of the exercise of reasonable care. For the law holds the defendant to the exercise of reasonable care, to the same extent as in case

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of actual knowledge. Particularly is this the rule in case of hotel keepers, livery stable keepers and common carriers, as it relates to the patrons of these. But it is said that the complaint in this case alleges knowledge and omits the alternative usually pleaded in such cases, "or by the exercise of ordinary care could have known, etc.," and therefore the latter duty is not within the pleadings and such an instruction is for that reason improper. While the form of the complaint is not to be commended in this respect, yet the charge as to knowledge, must of necessity embrace and include the full requirement of the law in that respect.

But the instruction not only does not embrace more than one proposition of law, but the four instructions complained of, embrace but one and the same proposition of law, and the same erroneous statement is included in each, thus unnecessarily and without reason, repeating the error, so that in this case it became flagrant. By these instructions the plaintiff was denied a substantial right, for it is difficult in any case to prove actual notice, and to sustain the instructions complained of, would be to overrule an unbroken line of precedent in this court.

Judgment reversed and the case remanded.

CHIEF JUSTICE MUSSER and JUSTICE GARRIGUES concurring.

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[No. 7468.]

## WILLISON, Building Inspector of Denver v. COOKE.

1. DENVER—*Charter Construed*—The charter of Denver (sec. 17) authorized the city council to enact and enforce ordinances necessary to protect life, health, and property; to declare, prevent, and summarily abate nuisances; and preserve and enforce good government, the general welfare, order, and security of the municipality,

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and the inhabitants thereof. *Held*, not to confer power to prohibit the erection of a store building upon lots fronting upon an ordinary street, without first obtaining the consent of the owners of the property in the same block, on each side of the street, and submitting to other burdensome restrictions.

2. CONSTITUTIONAL LAW—*Police Power—Restrictions Upon Building*—One of the essential elements of property is the right to its unrestricted use and enjoyment. Restrictions upon the use of private property are permissible only when necessary to the general health, comfort or general welfare of the public. A use of private lands which does not infringe the rights of others or impair the welfare and security of the public cannot be prohibited under the police powers of a municipality.

An ordinance which assumes to prohibit the erection, upon an ordinary street, of a store building, which, in respect of material and manner of construction complies with all local regulations, and is in no sense a menace to the health, comfort, safety or general welfare of the public, and involves no injury or insecurity to others, without first procuring the consent of the other owners of property in the same block, on each side of the street, and submitting to other burdensome regulations, is not within the implied powers of a municipal corporation, deprives the owner of his property without compensation, and without due process of law, is opposed to our bill of rights, secs. 3, 15, 25, and to the fourteenth amendment of the federal constitution, and is void.

3. PRACTICE IN THE SUPREME COURT—*Question not Presented Below*, will not be considered in the court of review. And the court will refer to the opinion of the court below, when found in the record, to determine what questions were there agitated.

*Error to Denver District Court.*—Hon. H. C. RIDDLE, Judge.

Mr. HENRY A. LINDSLEY, Mr. G. Q. RICHMOND, Mr. JOHN T. BOTTOM and Mr. A. NEWTON PATTON, for plaintiff in error.

JAMES H. BROWN, for defendant in error.

Defendant in error, as petitioner, brought an action in mandamus against the plaintiff in error, as respondent, in his official capacity as building inspector of the city and county of Denver, the purpose of which was to compel him to issue

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a permit for the construction of a building on the southeast corner of Colfax avenue and Williams street. In his petition, petitioner alleged that he was the owner of the lots in question; that respondent was the duly appointed, qualified and acting building inspector of the city and county of Denver; that he applied to respondent for a permit for the erection and construction of a one-story brick store building upon his lots, to cost the sum of ten thousand dollars, and then and there submitted and filed with him plans and specifications of the proposed building, showing and describing all parts of the construction thereof, and tendered him ten dollars, the prescribed fee for the issuance of the permit requested; that the plans and specifications submitted to and filed with the inspector, indicated and showed that the work to be done in the construction of the building was in all respects in accordance with the provisions of the ordinances of the city and county of Denver; that the inspector so found, but, without lawful excuse or reason therefor other than the provisions of certain ordinances referred to by number and title, refused to issue the permit applied for. Petitioner prayed that a peremptory writ of mandamus be issued, directed to the building inspector, ordering and commanding him, upon payment or tender of the proper fee therefor, to at once issue a permit for the erection of the proposed building on the lots mentioned.

To this pleading the respondent answered, admitting that petitioner was the owner of the lots in question; alleged that they fronted on the east side of Williams street, at the corner of Colfax avenue; admitted that, in so far as the application and the plans and specifications of the proposed building were involved, they indicated that the construction of the building and the materials to be used therein, were in all respects in accordance with the provisions of the ordinances of the city and county of Denver, and that he found the plans and specifications submitted to him by the petitioner to be in full compliance with such ordinances, in so far as the character of the building or the construction thereof, and the materials to be

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used therein, were concerned; but alleged that the building as indicated by the plans and specifications, as well as the application for the permit to erect the same, and in so far as the erection of the building relates to the location and construction thereof upon the premises described, did not comply with the provisions of the ordinances of the city and county of Denver. The answer then sets out the ordinances referred to, which are as follows:

"In the following described section or portion of the city and county of Denver (then follows a description by reference to streets, which includes the lots in question), it shall be unlawful to build or erect or make addition to a terrace (for more than two (2) families), apartment house, or flat (for more than four (4) families), store building or factory of any kind, rooming house of more than thirty (30) rooms, hotels or any buildings similar to those before mentioned, unless the party desiring a building permit for any such building has first secured and filed with the building inspector the signatures of a majority of the owners of the property in the same block, on the same side of the street, and of the owners of the property in the block on the opposite side of the street or avenue, facing same, approving of the erection of such a building, such approval to be accompanied by a certificate from some reliable abstract company that the parties signing the same are the owners of the property for which they signed. Before issuing any permit for any building, as before mentioned, the owner must specifically agree in writing to build said building on a line of the average distance back from the front line of lots as the buildings on the same side of the street in the same block; whenever such buildings are proposed to be erected on corner lots, they shall be set back from the front face of the lots to conform to the other buildings on the same side of the street in the same block, but may be built up to the lot line toward the street or avenue on the long side of the lot, provided that for the purpose of this section, the frontage of all lots within the city and county of Denver shall

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be and remain as laid out and platted at the time of the passage of this ordinance." Sec. 248, Municipal Code, as amended.

"If the matters mentioned in the application for a permit, or the plans and specifications filed with the same, indicate to the building inspector that the work to be done is not in all respects in accordance with the provisions of the city ordinances, he shall refuse to issue a permit therefor until the same has been made so to comply, when he shall issue the permit." Sec. 226, *ibid.*

"Whenever, in any block or on any street or avenue in the residence sections of the city and county of Denver, and fifty (50) per cent. of the lots in such block facing on said street or avenue have been improved, and the building line of the improvements made permanent, it shall be required that all buildings thereafter erected on adjoining lots within such block and facing on the same street or avenue must have the front building line established not nearer to the front lot line than the average distance back from the front line of the buildings already built. * * * "Sec. 250, *ibid.*

The answer then alleged that the petitioner did not secure and file with the inspector the signatures of a majority of the owners of the property in the block on the same side of the street in which the lots upon which it was proposed to erect the building are located, and the owners of property on the opposite side of the street facing the same, approving of the erection of such buildings; nor did petitioner specifically agree in writing to erect the building on a line the average distance back from the front lot line of lots that buildings on the same side of the street in the block in which his lots are situate, are constructed, nor did he agree that the building proposed to be erected should be set back from the front line of his lots to conform to other buildings on the same side of the street in the same block, but, in fact, insisted that the ordinances imposing these conditions as a condition precedent to the issuance of a permit were invalid and of no effect. The answer

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further alleges that the permit was refused because of the failure of petitioner to comply with the provisions of the ordinances above quoted in the particulars noted, for the reason that to issue the permit requested in such circumstances would be in violation of such ordinances, and contrary to the duty and obligation of respondent as building inspector of the city and county of Denver. The answer does not raise any issue upon the question that the proposed building will obstruct the street, or sidewalk, or upon the question of fire protection or insurance.

To this answer a demurrer was filed by petitioner, challenging its sufficiency to constitute a defense to the petition. This demurrer was sustained, and the respondent electing to stand upon his answer, the court ordered that a peremptory writ of mandamus issue, as prayed for by petitioner. The respondent has brought the case here for review on error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

From the foregoing synopsis of the answer, in connection with admissions therein of allegations in the petition, and the ordinances set out *haec verba*, it appears that petitioner is the owner of lots upon which he desires to erect a store building in a district which the ordinances of the municipality inhibit, unless he first secures and files with the building inspector the signatures of a majority of the owners of property in the same block, on the same side of the street, and of the owners in the block on the opposite side of the street facing the same, approving of the erection of such building, and that when such approval is secured, a permit will be withheld unless he agrees to build on a line the average distance back from the front line of lots that buildings on the same side of the street in the block in which his lots are situate are constructed; that the building which he proposes to erect complies in all respects, according to the plans and specifications, with the ordinances, in so far as the character of the building and the materials to be used therein are concerned, and that the sole defense interposed by respondent, and his only reason for

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refusing a permit, is based upon the failure or refusal of petitioner to comply with the provisions of the ordinances, as above noted. In brief, the ordinances inhibit petitioner from constructing a store building upon his lots until he complies with the provisions of such ordinances upon which respondent bases his right to refuse the permit requested, and even then, petitioner must agree not to construct his proposed building nearer the front line of his lots on Williams street than the average distance back other buildings on that street are constructed, in the same block, before the permit will be granted. The important question, then, to determine, is the validity of these ordinances, in so far as they provide conditions with which petitioner did not comply, and for which reason the respondent, according to his answer, refused the permit requested.

On behalf of respondent it is contended that these provisions are a valid exercise of the police power of the city, while on behalf of petitioner it is asserted that they are not, on the ground that they are so unreasonable as to be invalid, and, if enforced, deprive him of his property without compentation. It is a fundamental law, that a municipality under our system of government may, by ordinance, require the owner of a lot to so use it that the public health and safety will be best conserved, and to this end its police power may be exercised; but it is also fundamental, that such owner has the right to erect such buildings covering such portions thereof as he chooses, and put his property, as thus improved, to any legitimate use which suits his pleasure, provided that in so doing he does not imperil or threaten harm to others.—*Curran Bill Posting Co. v. City of Denver,* 47 Colo. 221 (225); *City v. Whitlock,* 149 N. C. 542; *Bryan v. City of Chester,* 212 Pa. St. 259; *Commonwealth v. Boston Advertising Co.,* 188 Mass. 348; *Bill Posting Co. v. Atlantic City,* 71 N. Y. Laws 72.

So that legislative restrictions upon the use of property can only be imposed upon the assumption that they are necessary for the health, comfort or general welfare of the public:

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and any law abridging rights to a use of property which does not infringe the rights of others, or which limits the use of property beyond what is necessary to provide for the welfare and general security of the public, cannot be included in the police power of a municipal government.—*In Re Morgan,* 26 Colo. 415 (423); *Curran Co. v. Denver, supra* (425).

Williams street is an ordinary public thoroughfare. It is not a park or park-way, and the authority of the municipality to make the provisions in question, so far as advised from briefs of counsel, is found in section 17 of the charter, which provides:

"* * * The council shall have power to enact and provide for the enforcement of all ordinances necessary to protect life, health and property; to declare, prevent and summarily abate and remove nuisances; to preserve and enforce the good government, general welfare, order and security of the city and county and the inhabitants thereof; * * *."

It will be observed that there is no express authority conferred upon the council to pass ordinances embracing the conditions and restrictions imposed as to lots fronting on an ordinary street upon which respondent relies; and hence, it is only by virtue of the incidental powers with which the municipality is vested to pass police regulations that it assumes to act in passing the ordinance in question; consequently, they are invalid, if it appears that they are unreasonable, arbitrary or oppressive.—*Phillips v. City of Denver,* 19 Colo. 179; *Curran B. P. Co. v. City of Denver, supra* (229); *City and County of Denver v. Rogers,* 46 Colo. 479.

Police regulations, in order to be valid, must tend to accomplish a legitimate public purpose; that is, such regulations must have a substantial relation to the public objects which government may legally accomplish; and while it is for the legislative department of a municipality to determine the occasion for the exercise of its police power, it is clearly within the jurisdiction of the courts to determine the reasonableness of that exercise, when, as in the case at bar, it assumes that

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power by virtue of its incidental or a general grant of authority.—*C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 561 (593); *In Re Morgan, supra* (424); *Curran B. P. Co. v. City of Denver, supra* (226).

The building which petitioner proposes to erect complies in all respects with the ordinances relating to the materials which shall be used in its construction. The lots upon which it is proposed to erect it front upon an ordinary street or public highway. A store building is in no sense a menace to the health, comfort, safety or general welfare of the public, and this is true, whether it stands upon the rear portion of the lots upon which it is erected, or is constructed to the line of the street; but even if it could be said that its construction imperiled or threatened harm to others, such objections would in no sense be removed by the consent to its construction by the majority of the owners of property in the same block on the same side of the street, and of the owners in the block on the opposite side of the street facing it; neither is it any more or less objectionable on the score mentioned, whether it be limited to the rear portion of the lots or covers them from alley to street line. It is thus apparent that the sole purpose of the regulations involved is to prevent the construction of a store building in the locality where petitioner's lots are located unless property owners, as indicated, consent; and then, if such consent is secured, to limit its construction to that portion of the lots not nearer to the front line of Williams street than the average distance back other buildings on that street in the same block are constructed. These regulations do not, in the slightest degree, have any relation whatever to the health, safety or general welfare of the public, nor do they tend, in any sense, to accomplish anything for the benefit of the public in this respect, but merely attempt to limit the petitioner in a use of his property, which does not infringe upon the rights of others. This deprives him of the fundamental right to erect a store building upon his lots covering such portions thereof as he chooses, although, by so doing, he does not im-

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peril or threaten injury to others of which they can lawfully complain. A store building in a residence section of the city is not desirable, from an aesthetic point of view; but restrictions for this purpose alone cannot be upheld, as it is only those having for their object the safety and welfare of the public which justifies restricting a use of property by the owner.—*Curran Co. v. City of Denver, supra* (226); *State v. Whitlock, supra* (543); *Varney et al. v. Williams,* 100 Pac. (Cal.) 867; *City of Passaic v. Patterson Bill Posting, A. & S. P. Co.,* 62 Atl. (N. J.) 267; *Commonwealth v. Boston Adv. Co., supra.*

We must, therefore, hold that the restrictions under consideration are invalid, because they have no relation to any object which the municipality, in the exercise of its police power, may legally accomplish, and are unreasonable, arbitrary, and oppressive.

Aside from this, the ordinances in the particulars involved violate sections 3, 15 and 25 of our bill of rights, which provide:

"Section 3. That all persons have certain natural essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."

"Section 15. That private property shall not be taken or damaged for public or private use without just compensation * * *."

"Section 25. That no person shall be deprived of life, liberty or property without due process of law."

This latter section is similar to the fourteenth amendment to the federal constitution, which declares:

"* * * Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

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One of the essential elements of property is the right to its unrestricted use and enjoyment; and as we have seen, that use cannot be interfered with beyond what is necessary to provide for the welfare and general security of the public. Enforcing the provisions of the ordinances in question does not deprive the petitioner of title to his lots. He would not be ousted of possession. He would still have the power to dispose of them; but, although there would be no actual or physical invasion of his possession, he would be deprived of the right to put them to a legitimate use, which does not injure the public, and this, without compensation or any provision therefor. This would clearly deprive him of his property without compensation, and without due process of law, which our federal and state constitutions not only inhibit, but which would be repugnant to justice, independent of constitutional provisions on the subject.—*City of St. Louis v. Hill,* 116 Mo. 527; *Bill Posting Co. v. Atlantic City, supra; Commonwealth v. Boston Adv. Co., supra; City and County of Denver v. Rogers, supra.*

For these reasons, the provisions of the ordinances involved are, also, invalid.

On behalf of the respondent it is urged that mandamus is not the proper proceeding on the part of the petitioner. It appears from the opinion of the trial judge that this question was not urged or passed upon in the court below, and for this reason, we do not deem it necessary to discuss that question on review.

The judgment of the district court is affirmed.

*Judgment affirmed.*

Decision *en banc.*

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[No. 7639.]

## COUNTY OF LARIMER v. ANNIS.

1. WATER RIGHTS—*Adjudication of Priorities*—It seems that after the proceeding under the statute for the adjudication of priorities has gone to final decree, the same court may, in the same proceeding, entertain a supplemental petition, and adjust the priorities of consumers whose rights were initiated subsequent to such final decree, readjusting and renumbering all priorities from the beginning.

2. ——*Liability of County for Fees of Referee*—Under section 3300 of the Revised Statutes the counties embraced within a water district are liable for the fees of the referee, not only in the initial proceedings for adjusting priorities, but in a supplemental proceeding had under the original petition, on application of consumers whose rights were not determined by the first decree, but had their inception subsequent thereto.

3. PRACTICE IN THE SUPREME COURT—*Presumptions*—Unless the contrary appears it will be presumed that the inferior court was acting within its jurisdiction.

4. ——*What May be Assigned for Error*—A county having refused to pay the allowances made by the district court to the referee in a proceeding to adjudicate the priorities to the use of water, that court ordered each of the persons and corporations affected by the decree to pay into court their proportionate shares of the amount awarded to the referee, to be refunded to them if the award to the referee should be affirmed. *Held*, that the county was not affected thereby and would not be heard to complain thereof.

*Error to Larimer District Court.*—Hon. JAMES E. GARRIGUES, Judge.

Mr. T. J. LEFTWICH, for plaintiffs in error.

Messrs. LEE & AYLESWORTH, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This case was submitted to the trial court upon an agreed statement of fact. From this it appears that on the 4th day of October, 1902, the defendant in error was appointed by the district court of Larimer county, as referee in the matter of

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water district No. 3, proceeding under the statute in such case provided for the adjudication of the rights of priorities to the use of water for reservoir purposes in said water district.

That in the discharge of his duties as such referee he rendered services for one hundred and twenty-five days, and which at the statutory fee of $6.00 per day, amounted to $750.00.

That he also incurred actual expenses in addition thereto in the sum of $986.20, making the total sum of the bill rendered, $1,736.20. It appears also that this water district embraced parts of both Weld and Larimer counties; that the judge of the court acting under the direction of the statute, in that respect, approved the said account for services and expenses, and divided it into two equal parts as provided by statute in such case, and certified to each of the said counties its proportionate share in the sum of $868.10. It appears that this account was paid by Weld county, but was disallowed by the board of county commissioners of Larimer county, and from such action an appeal was taken to the district court of that county. Upon the trial, judgment was rendered in favor of the defendant in error for the amount claimed as against the county, which judgment is now before us for review.

The only serious objection to the judgment is, that the statute under which this proceeding was had, is intended to apply to what counsel refers to as an "initial proceeding," whatever that may be. That the services of such referee were not rendered in such a proceeding and therefore the public, and in this case the county, could not be held liable for the expense of the reference.

It would seem to be the contention of counsel for the county, that where an adjudication had been once had as to priorities in a district, under the statute applicable, that thereafter no other general adjudication of like character can be had; but that claims of adjustment or for the establishment of priorities of water rights must proceed as affecting purely pri-

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vate rights, and the expense incurred should be that of the individuals, corporations or associations concerned.

No authorities are cited in support of this contention. The referee was appointed in this case, presumably under authority of sub-division B, chapter 72, Revised Statutes of 1908. The compensation for a referee is provided by sec. 3300 as follows:

"The referee appointed in this act shall be paid the sum of six dollars per day while engaged in discharging his duties as herein provided, and also his reasonable and necessary expenses and mileage at the rate of ten cents for each mile actually and necessarily traveled by him in going and coming in the discharge of his duties as such referee, which said per diem allowance, expenses and mileage shall be paid out of the treasury of the county in which such water district shall lie, if it be contained in one county, and if such water district shall extend into two or more counties, then in equal parts thereof, shall be paid out of the treasury of such county into which such district shall extend. He shall keep a just and true account of his services, expenses and mileage and present the same from time to time to the district court, or judge in vacation verifying the same by oath, and the judge, if he find the same correct and just, shall verify his approval thereof thereon, and the same shall thereupon be allowed by the board of county commissioners of the county in which said water district shall lie, but if said water district extend into two or more counties, he shall receive from the clerk of the district court separate certificates, under seal of the court, showing the amount due him from each county, upon which certificate the board of county commissioners of the respective counties shall allow the same on presentation thereof."

The agreed statement of fact as to a former proceeding in relation to the adjudication of water rights in said water district No. 3, is in substance as follows:

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On or about the first day of August, 1879, proceedings were instituted in that county entitled, "In the matter of a certain petition for adjudication of priorities of rights to use of water for irrigation in water district No. 3;" that a decree therein was entered on the 11th day of April, 1882, adjudicating certain water rights in said district. That subsequent to the day last named, certain persons interested, petitioned for a further adjudication of water rights in said district, and that these proceedings culminated in a decree of that court on the 11th day of April, 1884, and which decree determined the respective rights of all persons who had applied in said supplementary proceedings, save and except the rights of the Larimer County Ditch Company for its ditches and reservoirs, and that the said proceedings were continued open with respect to said claimants, and leave given to adduce proof of the completion of said ditches and reservoirs, and of the application of water by such means to a beneficial use; that afterward such proof was adduced and a decree entered adjudicating the rights of said claimants with respect thereto, on October 12th, 1886. Further, that the proceeding leading up to the decree of November 11th, 1882, and all subsequent proceedings thereto, were numbered 320 of the serial numbers of the cases filed in that court.

The agreed statement then sets forth certain named priorities and awards, under the last two named supplementary decrees, but these are not identical with the priorities and claimants involved in the proceeding under consideration.

It is further stipulated that all of these several rights were numbered with respect to the decree entered April 11th, 1882, which required the re-numbering of all priorities decreed between the first day of August, 1879, and the 12th day of October, 1886.

It is further agreed that the adjudication proceeding in which the defendant in error was referee, concerned no rights which antedated the entry of the original decree of April 11th, 1882, and concerned only such rights for storage pur-

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poses as had their inception subsequent to the last named date, except the Windsor Lake reservoir, owned by the claimants in these proceedings, upon which reservoir work was commenced between the first and fifteenth days of February, 1882, by the construction of an outlet ditch, the said reservoir being a natural basin having been filled for the first time during the year 1882, and subsequent to April 11th; and also excepting reservoirs 2, 3 and 4 of the Larimer County Ditch Company, work whereon was commenced April 21st, 1881, and not completed or in operation until after the 11th day of April, 1882. The priorities of the reservoir in the proceedings in which this plaintiff was referee, were numbered and considered independently of said former proceedings, also that in the proceedings which culminated in a decree dated December 9th, 1904, sixty-four separate reservoir priorities were awarded, ten of which antedated the 11th day of April, 1884; priorities No. 10 for the Richards reservoir, belonging to the Water Supply and Storage Company, being of the date of January 17th, 1884, and that fifteen of said priorities so awarded antedated the 12th day of October, 1886; priorities No. 15 belonging to reservoir claimants No. 8, the Dickson Canon Ditch and Reservoir Company for the Dickson Canon reservoir being dated October 8th, 1885, which priority is the last numbered priority prior in time, to four years subsequent to the date of the entry of the decree of April 11th, 1884.

This is all the information before this court for its consideration of the contention of counsel for the county, as it relates to prior proceedings in adjudication.

There seems to have been thirty-two water priorities involved in the proceeding in which the defendant in error acted as referee, owned by as many different persons, associations and corporations. But the record does not disclose the nature and character of such proceeding so as to convey even a suggestion of the issues involved or the scope of the action.

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There is certainly not sufficient in the showing here to enable this court to review that case so as to determine the regularity and validity of the proceeding, even were it proper to do so in this case. We must therefore, presume for the purpose of this action, that the court was acting within its jurisdiction and that all parties were within their rights. No objection is presented here and no right asserted by any claimant of a water right in that water district, and we can scarcely sustain the contention of the county without declaring the court to have been without jurisdiction in rendering the decree in that case.

The court also entered an order requiring all of the persons, associations and corporations affected by the decree, to pay into the court their proportionate share of the expense herein involved, for use of the defendant in error, pending this hearing, and that if the judgment in this case rendered shall be sustained, that the sum so recovered from the county, is to be paid into court and in the manner provided in the order, and repaid to the several contributors. It is contended that such order is in effect a double payment to the defendant in error for his services and expenses. This contention is not tenable. Beside, it is not for the county to complain of such order, for it is in no wise affected by it.

Complaint is further made that the item of stenographer's fees in the account so allowed by the court is excessive. The court made a finding and made its certificate of such finding as required by the statute. We see no reason to disturb it.

The judgment is affirmed.

CHIEF JUSTICE MUSSER and JUSTICE HILL concurring.

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[No. 7730.]

## BAILEY v. THE PEOPLE.

1. CRIMINAL LAW—*Homicide—Self-Defense—Right to Act on Appearances*—Where to an information for murder the defense is that the prisoner acted in defense of his household against serious bodily injury threatened by the deceased, the jury are to take into consideration, what, under the circumstances, the prisoner might have reasonable cause to believe as to the intentions of the deceased. An instruction to the effect that in order that the doctrine of self-defense should apply, the jury must believe that deceased intended to assault or kill the inmates of the house, is error, as a denial of the right of self-defense as defined in the statute (Rev. Stat., sec. 1632).

2. ——*Evidence—Information for Murder*—Deceased was the husband of a sister of the prisoner. The homicide was committed while deceased was attempting to forcibly enter the house of the prisoner where the wife had taken refuge, and was refusing to return to him. Evidence of acts of brutality committed by deceased upon the person of his wife, that these had been made known to the prisoner, that the wife had fled to the house of prisoner for protection, that deceased had made threats to take the life of both the wife and the prisoner, and that the general reputation of deceased was that of a quarrelsome and dangerous man, is admissible to show the state of mind of the prisoner, and the apprehensions which he might reasonably entertain as to the designs of the deceased.

3. ——*Duty of Prosecutor*—Information for wilful murder. Deceased was the husband of sister of prisoner. She had taken refuge from the husband's brutalities at the house of the prisoner where her mother was also residing. The homicide was committed while the deceased was attempting to force himself into the house of the prisoner in order to coerce the wife to return to him. The prosecutor was permitted to propound questions which, by innuendo, tended to reflect upon the moral character of defendant's house, and those who resided there. There was no evidence justifying these insinuations. The conduct of the prosecutor was declared reprehensible. "It is the duty of all counsel to repudiate all appeals to unworthy prejudice, and this is eminently so in the case of one who prosecutes for the people.

4. ——*Poor Person—Consideration Due To*—The prosecutor is bound to see to it that no unworthy advantage is taken of the accused, and this is especially so where accused is a poor person, and defends by appointed counsel.

5. HOUSE—*Right of Householder to Defend*—A householder may repel by force one who seeks to forcibly enter his dwelling; and if the

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**conduct, words, and known character of the assailant are such as to excite in the mind of a reasonable person the belief that his purpose is to kill or do great bodily harm to some person within the house, the householder is justified in carrying his defense, even to the taking of life.**

**6. HUSBAND AND WIFE—*Right of Husband to Control Wife's Person*—The husband is not entitled to enter the house and premises of another, against the will of the householder, for the purpose of conferring with his wife, and persuade her to return to him; much less may he use force to compel such return.**

*Error to Denver District Court.*—Hon. GEORGE W. ALLEN, Judge.

Mr. T. J. O'DONNELL, Mr. J. W. GRAHAM, Mr. CANTON O'DONNELL and Mr. WILLIS STIDGER, for plaintiff in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

Joseph E. Bailey, defendant in error, was convicted in the district court of the city and county of Denver, on the charge of the murder of Eugene H. Smith. The verdict was that of murder in the first degree. The wife of Smith was a sister of the defendant Bailey. The homicide occurred on the 18th day of July, 1910. It appears that because of a quarrel between Smith and his wife, and of the violent beating and abuse of her by Smith on the 15th day of July, the wife with her two children, left home and took refuge with her mother at the house where the defendant and his wife resided. This seems to have been but one of many similar occurrences.

At about ten o'clock on the evening of the 18th, Smith called over the telephone demanding that he be permitted to talk with his wife, which was refused by the mother who answered the telephone, whereupon Smith replied with vile and abusive language, which caused the mother to hang up the receiver. About fifteen minutes after this, Mrs. Smith's little boy, by a former marriage, who was in the yard for the purpose of sleeping there, and who had heard his grandmother

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talk over the telephone, came running into the house and shouted to his mother that he, meaning Smith, was coming. It seems that all of the occupants of the house had at this time retired, or were in the act of retiring. Upon hearing the boy's cry. Mrs. Smith ran into the bedroom occupied by the defendant and his wife, and called to him.

Mrs. Smith's testimony upon this point is in substance as follows:

"I looked out of the window, looked northward; I was undressed to go to bed; he was under the arc lights. He was almost running. He was just plunging, just coming in a jump like that, (indicating). It frightened me so; I could see from his appearance that he was in a very angry, bad mood, and I ran to my brother's bedroom door and called to him that there he came. I said to my brother: 'Get up out of bed, yes, there he comes,' and I said, 'For God's sake, don't let him come in here; if you do he will kill the whole family—he will kill mother and me.' "

The defendant thereupon arose from his bed, secured a revolver and called out to Smith through the window, demanding that he should not come into the yard. He then went from his bedroom into a room from which a door opened upon a porch, and upon which Smith was entering. The defendant called to Smith, it appears four times, and demanded that he should not come in. In reply to either the first or second request Smith said, "I will come in and get the whole God damned push of you."

Smith finally opened the screen door as if coming in, when the defendant said, "I tell you for God's sake don't try to enter this side porch or the house; if you do I will shoot you." About this time the defendant fired the shot that resulted in the death of Smith. The defendant was crippled in his right hand from an injury recently sustained, and was compelled to use the revolver with his left hand. Smith was a very large and powerful man, much larger than the defendant.

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It appears that earlier in the day R. L. McDonald, a brother-in-law, at the request of Mrs. Smith, went to Smith to see if an adjustment of their trouble could not be had, and at which time Smith said, "Well, if she will come back and live with me and do just as I say, I will live with her, and if she won't, God damn her, I will kill her."

A witness named Tyler, who was at the time living at the house of the Smiths', also testified that, "On the morning of the shooting, Smith showed me a gun and said, 'It was a God damn good thing you got me drunk last night, or I would have gone down and cleaned out the whole God damn push.' Smith came home on the morning of the 18th of July (the day of the shooting) about two o'clock. He had been drinking. He came into my room and raised a fuss with me; struck me and used—(the witness repeats vile language of deceased toward him). I had a thirty-eight revolver under my pillow; I drawed the gun on him and stood back on the opposite side of the bed until I could get down the stairway, and when I got down the stairway, I got out and stayed out the rest of the night. Mrs. Smith wasn't there; just I and Smith."

There are many assignments of error, but in as much as the case must be reversed by reason of certain prejudicial instructions given, it will not be necessary to consider other assignments.

The court over the objection of the defendant, gave instructions Nos. 10 and 21, which are so clearly erroneous and prejudicial to the rights of the defendant, and are so closely connected in their subject matter as to make it convenient to consider them together. These in full are as follows:

"No. 10. That if you believe from the evidence, that the deceased, Eugene H. Smith, attempted to enter the house of Joseph E. Bailey or his mother, wherein he resided, and that at the time he attempted to enter the same he feloniously intended to assault or kill any of the inmates thereof, then you are instructed that the doctrine that every man's house is

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his own castle, would apply, and the defendant Joseph E. Bailey is not required under the law to retreat from the position or stand which he had taken; but upon the other hand, if you believe that the said Smith attempted to enter the said house for the purpose of conversing with and inducing his wife to leave the said house, or for the purpose of using physical force, in endeavoring to do so, and had no intention of injuring or attempting to injure any of the inmates of the said house further than to exercise a reasonable supervision and control over his wife and her conduct, then you are instructed that there is no self-defense in this case, and no justifiable killing, and the said Joseph Bailey's killing of the deceased was unlawful, unless you believe from the evidence, that the circumstances attending the entry into the house was of such a character as would lead a reasonable man under like circumstances to believe that he or the inmates of the said house were about to receive great bodily injury."

"No. 21. The court instructs the jury: That the deceased, Eugene H. Smith, as the husband of the sister of the defendant, Joseph E. Bailey, had a right to exercise such reasonable control over her as was necessary to conduce to the proper establishment and maintenance of his household as the head of a family; and as such husband had a right to enter, in a lawful manner, the house or houses of any person whomsoever, for the purpose of talking with and procuring his said wife to leave the said house, if he so desired, and had a right to use such reasonable force and persuasion as was necessary to induce her to leave the house of her mother and come back to her home with him; and no person, not even her brother, Joseph E. Bailey, had a right to interfere with him in the exercise of such reasonable force or persuasion; and if you believe from the evidence, beyond a reasonable doubt, that the deceased, Eugene H. Smith, left his home on the evening of July 18th, and after telephoning to the house of Mrs. Bailey, went there for the purpose of seeing his wife and talking with her and endeavoring to persuade and induce

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her to leave the house of the said Mrs. Bailey, her mother, or to talk over their family affairs and difficulties, and that he had no intention to inflict bodily harm or injury upon the persons in said house, then you are instructed that there is no self-defense in this case and no justification for the killing of the said Eugene H. Smith by the said Joseph E. Bailey."

These instructions not only announce such palpable misstatement of the law as to prejudice the rights of the defendant, but go to the extent of proclaiming a doctrine concerning the relation of husband and wife as to appear nothing less than monstrous at this period of our civilization.

The jury are here told that in order that the doctrine of self-defense may apply, they must believe from the evidence that Smith attempted to enter the house of defendant, and also that at that time he feloniously intended to assault or kill any of the inmates. This is not the law. It is not the state of the mind of the defendant alone which the jury are to consider, but of the deceased as well. That is to say, what the defendant believed, or what under all the circumstances he might have reasonable cause to believe to be the intention of the defendant.

These instructions are the equivalent of a denial of the very right of self-defense as defined and provided by our statutes. Sec. 1632, Revised Statutes, 1908, provides:

"Justifiable homicide is the killing of a human being in necessary self-defense or in the defense of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, burglary and the like, upon either person or property, or against any person or persons who manifestly intend and endeavor in a violent, riotous or tumultous manner to enter the habitation of another for the purpose of assaulting or offering personal violence to any person, dwelling or being therein."

The evidence clearly justified the submission to the jury of the question as to whether or not the deceased was a per-

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son who manifestly intended and endeavored in a violent, riotous or tumultous manner to enter the habitation of the defendant for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

Instruction No. 21, without qualification, declares in substance that a husband without warrant of authority, and over the protest of the occupant has a right to enter the house or houses of any person whomsoever, for the purpose of talking with, and procuring his wife, and against her will, to leave such house if he so desires.

This is not now and never was the law in this country. It is a repudiation of every reasonable conception of the law of domicile and the right of habitation. Neither a husband nor any other person has such right. It strikes at the very foundation and sanctity of home life. It gives license to every drunken vagabond or other evil person, to invade the privacy of every man's home. It would destroy the moral, constitutional, statutory and common law right of defense of habitation.

It is true the instruction declares the entrance must be in a lawful manner. But there can be no such thing as lawful entrance under such circumstances.

But the part of the paragraph of the instruction following, is even more shocking. Here the jury are told that a husband may over the protest of the occupant of the house, and over the protest of the wife of the husband so entering, not only enter any man's house, but has a right also to use such reasonable force and persuasion as may be necessary to cause the wife to leave the house of *his* mother and come back to his home with him, and that no person, not even her brother has a right to interfere with him in the exercise of such reasonable force or persuasion.

The use of the word "force" in connection with the word persuasion can refer to physical force only, and the exent of this force is thus limited only by the necessity of the case, in order to so secure the possession, control and abduction of

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the person of the wife, and all this as against her will, her fear, and even the apparent danger of her life.

In other words, if this be the law, whatever may be the circumstances, the defendant was absolutely without right to defend his home and his near relatives from the threatened assaults and brutality of an infuriated and drunken husband, at whose will the home is to be made the place of riot and the occupants to suffer mental distress, probable assault, and as indicated by the testimony in this case, possible murder.

Such is not and can never be the law in a civilized country.

This assertion of the right of a husband to control the acts and will of his wife by physical force cannot be tolerated.

The prejudicial effect on the defendant's rights by these instructions is too palpable to require comment.

Counsel for defendant in their very excellent brief have cited many cases bearing upon this question. Among these is that of the English case of *Queen v. Jackson,* Div. 1, 1891. This was a case where a husband undertook to restrain the liberty of his wife by forcibly keeping her in his own home after she had declined to further live with him. The decision of the court in that case may be epitomized in the statement of Mr. Helmer Collins, Q. C., as follows:

"The contention of the husband would result in the re-introduction into society of private war; for the male relations of a wife would naturally, if at hand, be likely to resist her capture by the husband. The contention for the husband involves wholly untenable propositions. First, it involves that the husband may take possession of the wife's person by force, though no process of law could give him such possession of her. There never was any process of law for siezing and handing over the wife to the husband." * * *

"A husband has no such right at common law to the custody of his wife. It is inconceivable that the husband should be entitled to do by force for himself that which the law cannot enforce in his favor."

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In *Fulgham v. State,* 46 Ala. 143, the rule is stated as follows:

"But in person, the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the state, and is entitled, in person and in property, to the fullest protection of the laws. Her sex does not degrade her below the rank of the highest in the commonwealth."

In *State v. Oliver,* 70 N. C. 44, it is said:

"We may assume that the old doctrine that a husband had a right to whip his wife, provided he used a switch no larger than his thumb, is not law in North Carolina. Indeed, the courts have advanced from that barbarism until they have reached the position that the husband has no right to chastise his wife under any circumstances."

Again, in *Buckingham v. Buckingham,* 81 Mich. 89, the same doctrine is declared:

"There would seem to be no legal principle which would prevent her from voluntarily deserting her husband, and abandoning her homestead. She is in no sense the slave of her husband, and is so far the master of her own will that she has liberty to remain with her husband, or go from him, as she pleases; and he has no legal remedy to compel her to return."

In *State v. Connolly,* 3 Ore. 69, the principle is stated as follows:

"If Mrs. Hill, the wife of the deceased, having reasonable ground to apprehend personal violence at the hands of her husband, sought a temporary refuge in the defendant's house, and the deceased, being forbidden, sought to enter, then either the defendant or his wife had a right to use all necessary force to prevent him from entering."

And in *Commonwealth v. McAfee,* 108 Mass. 459, we find a very clear and comprehensive statement of the rule:

"It may be stated, however, that under modern legislation, as well as judicial opinions, that fiction of legal unity

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by which the separate existence of the wife in a legal sense is denied is exploded. Her person is as sacred as that of the husband, and the protection afforded by law to the one should not be denied to the other. In fact, courts of equity have always recognized the separate existence of the wife in reference to her sole and separate estate, and to say that a court of law will recognize in the husband the power to compel his wife to obey his wishes, by force if necessary, is a relic of barbarism that has no place in an enlightened civilization."

Many additional authorities are cited to the same effect. Instruction No. 25 was as follows:

"No. 25. You are instructed that there is no manslaughter in this case."

And again, instruction No. 26 contains the following:

"You are instructed that under the instructions in this case, and the evidence, you are at liberty to find the following verdicts: Murder in the first degree; murder in the second degree, or not guilty."

Under the testimony, this was clearly material error. This subject was exhaustively discussed by Mr. Justice Gabbert in the recent case of *Henwood v. People,* decided at this term of court, and it is only necessary to cite this authority without a repetition of the argument.

Considering the testimony in this case in comparison with the circumstances there, we cannot escape the conclusion of error in the giving of these instructions. This becomes more apparent when we consider the testimony offered by the defendant and refused by the court.

In line with the court's theory as outlined in the instructions, testimony competent and vital to defendant's defense of self-defense, was refused and stricken out. This line of testimony is sufficiently indicated by the statement of defendant's counsel as to what he desired to prove as follows:

"I want to show, prior to the night of the killing and since the marriage of the deceased to Mrs. Smith, the sister of the defendant, that there have been repeated and continued

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acts of brutality on the part of the deceased; that these acts were made known and the results of them, to the defendant. That the deceased had made threats to take the life of both the sister of the defendant and the defendant himself; that on the day of July 15th, 1910, there was a fight, a row occurred in the house of Smith; at that time he jumped upon the abdomen of his wife and caused hemorrhages, which afterwards necessitated an operation. That Mrs. Smith left his house and fled to the house of the defendant for protection, as she had done oftentimes before; and I want to show that also, to show the state of mind that the defendant was in and the apprehension he might have as to the designs of the deceased."

And again:

"I want to ask questions of this witness, and other witnesses, which show the probability of whether or not Mr. Smith was the aggressor, and I want to ask this witness everything that Mrs. Smith would have been allowed to testify to were she the defendant, and what he knew of prior to the time of the shooting."

The court in the instructions and in the rejection of testimony offered, has overlooked the right of the brother to use such force as may be necessary for the protection of the person and life of his sister, as well as a consideration of the sudden passion that may be aroused in such a case.—*Campbell v. Commonwealth,* 88 Ky. 402.

The defendant complains and assigns as error the conduct of the deputy district attorney and the court. It is not necessary to go into detail in this matter, nor to especially consider it in that light, but some of the acts of both, in this regard were unusual, uncalled for, and manifestly unfair.

The refusal of the court to permit the defendant to show the general reputation of the deceased in the neighborhood in which he lived, as to being quarrelsome and dangerous, was worse than error. Considering the well known state of the law in this regard, this was inexcusable.

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But still more grevious was, that after the court had rejected such testimony, it permitted the deputy district attorney to introduce testimony in rebuttal tending to show the reputation of the deceased in this respect, to be good. Citation of authorities as to these matters is not required.

Very much of the conduct of the deputy district attorney upon the trial was unfair, at least, if not reprehensible. For instance, he asked and was permitted to ask, questions of witnesses which by insinuation and innuendo, tended to reflect upon the moral character of the home of the defendant and his mother, when there was not a scintilla of testimony to justify these questions. This court in *Ritchey v. People,* 23 Colo. 314, has approved Mr. Wharton's statement of the duty of a prosecuting attorney in the trial of criminal cases:

"It is scarcely necessary to add that a prosecuting attorney is a sworn officer of the government, required not merely to execute justice, but to preserve intact all the great sanctions of public law and liberty. No matter how guilty a defendant may in his opinion be, he is bound to see that no conviction shall take place except in strict conformity to law. It is the duty, indeed, of all counsel to repudiate chicanery and appeal to unworthy prejudice in the discharge of their high office; but eminently is this the case with public officers, elected as representing the people at large, and invested with the power which belongs to official rank, to comparative superiority in experience, and to the very presumption here spoken of that they are independent officers of state."

Particularly should this be his course of conduct in a case like this, where the defendant is in poverty and defended as a poor person. It is such conduct upon the part of officials, entrusted with power to enforce the law, as appears in this case, that breeds discontent, subjects courts to criticism and provokes contempt of the law.

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The judgment is reversed and the case remanded.

Mr. JUSTICE MUSSER concurs.

Mr. JUSTICE GARRIGUES concurs i nthe reversal of the case upon the ground that the instructions were erroneous.

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[No. 7744.]

## FULLEN v. WUNDERLICH.

1. PRACTICE IN SUPREME COURT—*Questions not Presented Below*, will not be considered in this court, even though upon application to vacate a judgment, and the objection goes to the jurisdiction of the court.

2. JUDGMENT—*Vacating—Summons not Personally Served*—Whether upon application under section 81 of the code a judgment rendered without personal service may shall be vacated, is in the discretion of the court.

The action was instituted in January, 1911, and judgment entered July 20th, A. D. 1911, upon publication of the summons, the clerk of the court had mailed a copy of the summons and complaint to defendant, at the address given in the affidavit for publication. The motion to vacate the judgment was filed February 11th, A. D. 1912. No explanation was given of this delay. The affidavit in support of the motion failed to show that defendant was ignorant of the pendency of the cause, nor that he failed to receive the copy of the summons and complaint, nor that the address given in the affidavit for publication was not his address. The affidavit was held insufficient, and the motion properly denied.

*Error to Phillips County Court.*—Hon. S. S. WORLEY, Judge.

Messrs. ROLFSON & HENDRICKS, for plaintiff in error.

Mr. W. D. KELSEY, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

Upon July 20th, 1911, the plaintiff, defendant in error here, secured a judgment against the defendant, plaintiff in

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error here, in the sum of $265.15 and costs taxed at $32.54. This judgment sustained a writ of attachment theretofore levied upon real estate, and included an order that so much thereof as was necessary to satisfy the judgment, be sold under special execution. This was issued upon the same date and returned August 15th, 1911, showing the sale of the property, etc.

property,etc.

Upon February 9th, 1912, the defendant filed a motion to set aside the judgment and for leave to answer to the merits of the original action for the following reasons: First, that defendant had not been personally served with summons and that judgment was entered on the 20th of July, 1911, being less than one year previous to the filing of the motion. Second, that the defendant has a good and sufficient defense to the action on the merits. This, it is alleged, more fully appeared in the affidavit of the defendant filed with the motion. It states, that he is a non-resident of Colorado; that he has not been personally served with summons in the above entitled action; that the judgment was entered on the 20th day of July, 1911; that he has fully and fairly stated the case to his counsel and after such statement he is advised by his counsel and believes that he has a good, full and perfect defense to the action upon the merits.

The motion to vacate the judgment, etc., was overruled. The defendant brings the case here for review.

Many reasons are urged why the court was without jurisdiction in the original action, the pleadings defective, the service void, the proceedings irregular, the judgment void, voidable, etc. As none of these questions were raised in the court below upon this motion, following the well recognized practice of this court, we will not consider them, but will limit our review to the reasons then raised and passed upon, as to why the motion should be granted.—*Cone v. Eldridge,* 51 Colo. 564; *Leary v. Jones,* 51 Colo. 185; *Jakway v. Rivers,* 48 Colo. 49; *Rice v. Cassells,* 48 Colo. 73; *Nelson et al. v.*

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*Chittenden,* 123 Pac. (Colo.) 656; *Barr v. People,* 30 Colo. 522; *Auckland v. Lawrence,* 20 Colo. App. 364; *Quinn v. Baldwin Star C. Co.,* 19 Colo. App. 497; *City of Denver v. Moewes,* 15 Colo. App. 28; *Clayton et al. v. Clayton's Heirs, etc.,* 4 Colo. 410.

The defendant's contention presented by his motion rests upon the proper construction to be given the concluding clause of general section 81, Revised Code, 1908, it reads:

"When for any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action." It is claimed that when a defendant brings himself within the provisions of this paragraph and shows he has a meritorious defense that he is entitled to this relief as a matter of right without showing mistake, inadvertence, surprise or excusable neglect, that the court has no discretion, but must grant the relief. *Gray v. Lawlor,* 151 Calif. 352, the cases therein cited and other California cases are cited to sustain this position. Whatever may be the rule in other jurisdictions, under their code provisions, it has been held by this court and by our court of appeals that the granting or denying of a motion to set aside a judgment and to allow answer to the merits under section 81, *supra,* is discretionary with the trial court.—*R. E. Lee S. M. Co. v. Englebach,* 18 Colo. 106; *Donald v. Bradt,* 15 Colo. App. 414; *Morrell H. Co. v. Princess G. M. Co.,* 16 Colo. App. 54.

Eliminating the question of the sufficiency of the affidavit pertaining to merits, under the circumstances disclosed we do not think the court abused its discretion in overrulling the defendant's motion. The suit was instituted in January, 1911; judgment was entered July 20th, 1911. The defendant's motion to set aside judgment and for leave to answer to the merits was filed February 9th, 1912. The affidavit in support thereof does not state that he was theretofore ignor-

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ant of the pendency of the action, or if he was when knowledge reached him concerning it, or that he acted with any diligence thereafter; he in no manner attempts to excuse his delay of over seven months before making this attempt to have the judgment set aside. He does not state that he did not receive a copy of the summons and complaint mailed to him at his postoffice address in Nebraska. The burden is upon him to show everything that would entitle him to a vacation of the judgment in the exercise of sound discretion by the court. As stated by our court of appeals in *Donald v. Bradt et al., supra,* at page 418, "It is true, that under this code section, a defendant not personally served with summons has twelve months within which to apply to have a judgment vacated, but the lapse of time after he obtains knowledge of the judgment and before he applies may be, and indeed is, in many cases an important factor to be considered by the court in exercising its discretion." The affidavit upon which the order for publication of summons was based, states his last known place of residence was Grand Island, Nebraska. The clerk of the court, as appears from his affidavit in the record, mailed a copy of the summons and complaint to the defendant at that point, immediately upon the issuance of the order for publication. The defendant does not allege that he did not receive these papers or that Grand Island was not at that time his post office address. For all that appears in the affidavit the defendant could have known all about the suit and might be attempting to take advantage of his being a nonresident in order to delay its ultimate termination. In our opinion the affidavit in this respect was insufficient to justify the granting of the motion.

Perceiving no prejudicial error the judgment of the court in refusing to set aside the judgment and for leave to answer to the merits is affirmed. *Affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 7763.]

## CORYELL ET AL. v. FAWCETT.

**PRACTICE IN THE SUPREME COURT—*Writ of Error Sued Out Collusively*, and under a precedent agreement that the defendant in error shall confess errors, the controversy of the parties being adjusted, and the real purpose being to vacate an allowance to the attorneys for their fees, will be dismissed. Such proceeding is a fraud upon the attorneys and an imposition upon the court.**

*Error to Garfield District Court.*—Hon. CHARLES MCCALL, Judge.

Mr. E. L. CLOVER, for plaintiffs in error.

Mr. H. J. O'BRYAN, for defendant in error.

*PER CURIAM:*

Through her attorneys, D. M. Campbell and S. J. De Lan, the defendant in error, Miss Pauline M. Fawcett, claiming to be a stockholder in the Garfield County Coal and Fuel Company, prosecuted an action in the district court of Garfied county against Perry C. Coryell and his wife, Minnie B. Coryell, and the coal company. The Coryells were the officers and a majority of the board of directors of the company, and the holders of all the capital stock, unless Miss Fawcett owned five thousand shares which she claimed. In the complaint it was alleged that she owned these shares. Her ownership thereof was admitted by the defendants in their answer and throughout the trial. The certificate therefor was not produced, and the company had no stock ledger or other book to show who were the owners of the stock. The result of the action in the district court was a decree that Mrs. Coryell convey to the coal company certain lands which she had taken in her own name, and which the court found belonged to the company; that she pay to the company $20,474 in money; that Perry C. Coryell pay to the company the sum of $1,000,

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and that the company pay to D. M. Campbell and S. J. De Lan, as attorneys' fees for them as the plaintiff's attorneys, the sum of $2,500.

A receiver was appointed to take charge of the business and property of the coal company, who was empowered to do all things that he might lawfully do for the best interests of the company and those interested, and to sue for and collect all money and property due the company, and make distribution thereof according to the respective rights of the stockholders, and in such manner as might be approved by the court.

After judgment, the Coryells applied for a new trial. In support of this application, Mr. Coryell, in an affidavit set forth a chain of facts and circumstances which he began vaguely to remember after the trial, and whereby he attempted to show that Miss Fawcett did not in fact own any stock in the company, but that the stock she had owned, and which was treated as hers at the trial, had been turned over to Mrs. Coryell several years before for a certain consideration, since which time the Coryells had been the owners of all the stock of the company, and the corporation had practically gone out of business. Miss Fawcett denied this in a counter-affidavit. The motion for a new trial was overruled in August, 1911. On March 14, 1912, a transcript of the record was filed in this court, and the cause docketed on error with the coal company and the two Coryells as plaintiffs in error, and Miss Fawcett as defendant in error. On the same day and simultaneous with the filing of the transcript, there was filed on behalf of Miss Fawcett, the defendant in error, what purports to be a confession of errors, wherein, after confessing that the court below committed prejudicial error in many particulars, Miss Fawcett empowered an attorney other than Campbell and De Lan to appear for her, file the confession of errors, consent that the judgment be reversed and annulled, and that a final judgment be entered in this court dismissing the complaint.

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When the filing of this confession of errors was brought to its attention, this court, of its own motion, appointed a commissioner to take testimony with reference to the preparation and filing thereof. The parties, together with Campbell and De Lan, appeared before this commissioner. Testimony was taken, and the same together with the certificate of the commissioner relative thereto were filed in this court. It appears from the testimony of Miss Fawcett, Mr. Coryell and others, taken before the commissioner, that after the motion for a new trial was denied Miss Fawcett became convinced that she was not the owner of any stock in the company, and that the stock which she had claimed had been by her turned over to Mrs. Coryell for a consideration several years before she began the action. When she became convinced of this she disclaimed any interest in the company, or in the litigation or judgment, and desired, as she expressed it, "to quit." Thereupon, the Coryells and Miss Fawcett had various meetings, conversations and negotiations, the result of which was that the certificate of stock theretofore claimed by Miss Fawcett was found and turned over to the Coryells, and Mr. Coryell had his attorney prepare the confession of errors, which, if we understand her testimony aright, was outlined by Miss Fawcett. The confession was prepared and sent to Mr. Coryell, who in turn sent it to Miss Fawcett. The latter signed and acknowledged it before a notary public, and transmitted it to an attorney, authorizing and directing him to file it and to consent to the reversal of the judgment and the dismissal of the complaint as above stated. Mr. Coryell, at the request of Miss Fawcett, had seen this attorney, and the latter consented to act for her upon her assurance that her other attorneys had been discharged. Campbell and De Lan were not notified or consulted with reference to the confession of errors, and knew nothing concerning it until they were notified by order of this court. All that was said to them with reference to settling the matters was in September, 1911, when Miss Fawcett sent to Campbell an alleged proposition of compro-

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mise or settlement from Coryell, which was returned by Campbell to Miss Fawcett, with a notation thereon that there was nothing to compromise; that her rights were fully protected by the judgment and there was nothing to do but to execute it. When asked by Campbell if she remembered sending a proposition of compromise, Miss Fawcett said: "I do. You turned it down as a yellow dog. You told me to go no further. I got your letter. I know what you said. I gave you a fair, square chance. You would not take it. I was going into bankruptcy and I wasn't going, and I quit. Now, there you have got it." After that Campbell and De Lan seemed to have been studiously ignored. It was also made to appear to this court that shortly before the transcript and confession of errors were filed, the receiver, at the direction of the district court, was proceeding to sell some of the property of the company to pay the costs of the trial and the attorneys' fees allowed to Campbell and De Lan. While the Coryells and Miss Fawcett were careful in their testimony to avoid saying that their matters had been settled prior to the filing of the transcript and confession of errors, it is very plain from the testimony and the confession of errors that they had reached an understanding and agreement to wipe out the judgment of the district court, and to dismiss the action, leaving the Coryells the owners of and in possession of all the capital stock of the company, and its officers and directors. Before the cause was docketed in this court, Miss Fawcett had disclaimed all interest in the company and the judgment, and declared that she never had any cause of action against the defendant. She no longer claimed to be a stockholder. The stock that she had claimed had been turned over to the Coryells, and they were, without dispute, the owners of and in possession of all the capital stock, and were the officers and directors. There remained no longer any real or live controversy between the parties to the action. So far as the rights of the Coryells, the company and Miss Fawcett are concerned, their controversy was settled, and the matters over

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which the litigation had been waged adjusted. To effectually wipe out the litigation and the judgment, it is plain that the parties further agreed that the case should be lodged in this court in the form of a writ of error, together with a confession of errors, so that a reversal of the judgment and a dismissal of the complaint should be at once secured. It was not necessary to bring the case here to effectuate the settlement. In so far as the rights of the parties are concerned, that could have been accomplished in the district court. Mrs. Coryell was the owner of all the capital stock, except possibly two shares held by Perry C. Coryell and Perry C. Coryell, Jr., who with Mrs. Coryell were directors, and the company had no debts. The only reason for the attempted proceeding in this court that the parties could have had was the anticipation that a reversal of the judgment and a dismissal of the complaint would defeat the rights of Campbell and De Lan to the attorneys' fees allowed them. Having settled their own matters, the parties have attempted surreptitiously and without notice, to use this court to defeat the attorneys. From the foregoing, the following conclusions necessarily follow:

1. The matters in controversy and the subject of the litigation between the Coryells, Miss Fawcett and the company have been adjusted and settled between them, and the errors, if any, occurring in the lower court, have become moot; for whether the judgment be reversed or affirmed the same result will follow from their agreement. When parties have settled their differences there remains no real controversy or live question concerning the matters that the litigation was about. If parties dispose of the subject matter of litigation there remains no matter to litigate. Under such circumstances, a writ of error will be dismissed.—*People v. Hall,* 45 Colo. 303; 2 Cyc. 533; 3 Cyc. 188.

2. The parties did not intend that any of the errors assigned should be reviewed in this court. The confession of errors was made before the case was lodged here, and then filed at the same time that the transcript was filed and the case

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docketed, and the confession was made without regard to the merits of the alleged errors. As no review was ever intended the writ of error was not sued out in good faith. The purpose of a writ of error is to obtain a *bona fide* review of a judgment of a lower court and when such a writ is sued out, not for the purpose nor with the intention of having a *bona fide* review, but for some other and ulterior purpose, foreign to the purpose of appellate jurisdiction, it cannot be said to save been sued out in good faith, nor that the appellant jurisdiction has attached. Such a proceeding is a pretense and a sham and can not give parties any standing.

3. The evidence before us, circumstantial and otherwise, indicates that the parties endeavored to defeat Campbell and De Lan of their attorneys' fees. For the accomplishment of that purpose, the parties hit upon the plan of pretending to institute proceedings in error in this court, and, by confessing error as to matters concerning themselves and over which there was no longer any controversy, secure a reversal of the judgment and a dismissal of the complaint. It was not intended to have a real review of the question of the allowance of attorneys' fees. The proceeding was resorted to for ridding the company and the Coryells of the attorneys' fees allowed, and leaving the attorneys to look for payment for their services to their client, who confessed that she was going into bankruptcy. It is certain that Campbell and De Lan were led to believe, and confirmed in the belief by all the parties, plaintiff and defendants, that Miss Fawcett was a stockholder in the company, and as such prosecuted the action, which, through the work of the attorneys, resulted in a very substantial judgment in favor of the corporation. Certain it is that these attorneys were and are entitled to just compensation from some one. In the final disposition of the controversy, fair dealing required that they be considered, consulted and given an opportunity to protect their rights, whatever they may be. The manner in which it was sought to do away with the rights of these attorneys was a fraud upon them,

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and the use of the forms of review, for the purpose of completing that fraud, was an imposition upon this court. This court has the right and it is its duty to protect itself from imposition and from being used as an instrument for the accomplishment of a designed wrong, by parties who invoke its jurisdiction in bad faith. To retain this pretended proceeding in error in this court would be to condone wrong and to say that parties have the right to impose upon courts and use them for illegitimate purposes.

The least that should be done under all the circumstances as recited is to leave the parties in the situation in which they had placed themselves before they pretended to invoke the jurisdiction of this court. That can be accomplished by striking the confession of errors and dismissing the writ of error, and the same is accordingly done.

*Writ of Error Dismissed.*

Decision *en banc.*

Mr. JUSTICE WHITE dissents.

Mr. JUSTICE WHITE dissenting:

I can not agree to a dismissal of this suit, at this time, upon the record as it now is. To do so affirms the judgment in every particular and, as I believe, deprives, at least, two of the plaintiffs in error of a constitutional right.

Pauline M. Fawcett prosecuted a stockholders' suit against The Garfield County Coal and Fuel Company and Perry C. Coryell and Minnie B. Coryell, a majority of the members of its board of directors. Upon final hearing a decree was entered requiring Minnie B. Coryell to convey to the coal company certain lands of the value of $50,000, which she claimed at her own; that she likewise pay to the company $20,474 in money; that Perry C. Coryell pay to the said company the sum of $1,000. It was further adjudged in the decree that the company pay to D. M. Campbell and S. J. De-

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Lan, who had represented the plaintiff in the prosecution of the suit, the sum of $2,500 as attorneys' fees therein, and a receiver was appointed to take charge of the property and carry on the business of the company.

March 14, 1912, the company, Minnie B. Coryell and Perry C. Coryell, as plaintiffs in error, presented a transcript of the record and docketed the cause in this court on error, being represented therein by the same attorney that represented them in the trial court. On the same day Pauline M. Fawcett, the defendant in error, through an attorney of this court, H. J. O'Bryan, filed a confession of errors and consent that the judgment be reversed and annulled, and that a judgment be entered in this court dismissing the complaint. Plaintiffs in error thereupon applied for a supersedeas, and, at the time of the hearing thereof, the confession of errors was brought to the attention of the court. Upon an inspection of the record, it appearing that the decree ordered the payment by the coal company to Messrs. Campbell and De Lan of a certain sum as attorneys' fees, it was thought wise, before taking action in the premises, to advise them of the confession of errors filed, which was done. Thereupon Messrs. Campbell and De Lan, by telegram, and subsequently by letters, entitled in the cause and addressed to the clerk of this court, protested against the acceptance of the confession of errors and the disposition of the cause thereon, claiming to be the attorneys authorized to act for the defendant in error. Within two or three days thereafter, defendant in error, in her own proper person, presented for filing in this court a paper, entitled in the cause, wherein she denied the authority of Campbell and De Lan, or either of them, to represent her in the suit in this court, declaring that they had no right or authority to appear for her in said cause in any way, and that H. J. O'Bryan was her attorney therein. Thereupon this court, of its own motion, appointed a commissioner to take testimony with reference to the preparation and filing of the confession of errors, but in no wise designated the witnesses

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to be examined, or the scope of the inquiry. The witnesses examined were E. L. Clover, attorney for plaintiffs in error; Pauline M. Fawcett, defendant in error; Henry J. O'Bryan, the attorney representing her in this court; Perry C. Coryell, one of the plaintiffs in error; D. M. Campbell and S. J. De Lan, the attorneys who had represented defendant in error in the court below, and J. D. Fillmore, a clerk in the office of S. J. De Lan.

Plaintiff in error, Minnie B. Coryell, neither testified, nor does the record disclose that she was present at, the hearing before the commissioner. Moreover, contrary to the statement in the opinion, it does not appear that the Coryells and Miss Fawcett had various meetings, conversations and negotiations, and had reached a conclusion whereby the rights of the Coryells, the company and Miss Fawcett were settled and the matters in litigation adjusted. The only meetings, conversations and negotiations that were had, if any, were between Perry C. Coryell and Miss Fawcett, and there is no evidence that Minnie B. Coryell was in any wise apprised thereof. Besides, the testimony is positive that nothing whatever was paid or promised Miss Fawcett as a consideration for the filing of the confession of errors. Her testimony is specific that she was prompted thereto solely by reason of the production and inspection of a forgotten letter written years before, wherein she had sold and placed in trust for delivery the shares of stock in the company which she had, prior to the determination of the suit, believed she owned and which trust had been carried out according to its terms. The testimony of Perry C. Coryell is to the same effect, and there is none of a direct nature to the contrary. If this court, upon evidence taken for the purpose of ascertaining the relation of attorneys to a confession of errors filed, disregards the positive testimony of two of the interested parties to a suit, and, from inferences only, finds that the cause was settled as between the two, it surely can not properly extend that finding to another party to the suit who was neither a witness heard

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therein, nor apprised that the inquiry would extend to the question of whether or not a settlement of the litigation had been made. Therefore, the court can not, it seems to me, consistent with the rules of procedure and the principles of justice, foreclose the constitutional right of Minnie B. Coryell, at least, to have the enormous judgment entered against her reviewed by writ of error in this court. It is said that the only reason for lodging the case here was the belief of the parties that a reversal of the judgment and the dismissal of the complaint would defeat the rights of Campbell and De Lan to the attorneys' fees allowed them. If it be true that some of the parties so intended, the record certainly does not disclose, even by inference, that Mrs. Coryell shared in such intent or had knowledge thereof.

It is asserted, presumably to show that no harm will follow an affirmance of the judgment by dismissal of the writ of error, that Mrs. Coryell is the owner of all the capital stock of the corporation, except two shares held by Perry C. Coryell and Perry C. Coryell, Jr., and that the Coryells constitute the board of directors, and the company has no debts. If the statement, as to the ownership of the stock, control of the corporation and its freedom from indebtedness, be true, it in no sense changes the situation nor removes the probability of grave injustice being done the Coryell judgment debtors. The record shows conclusively that forty-five thousand (45,000) shares of the capital stock, being all thereof except five thousand (5,000) shares claimed at the time of the suit by Miss Fawcett, are in the possession of a bank as collateral security upon an indebtedness to the bank of some person or corporation not disclosed. Suppose the payment of such indebtedness is defaulted? Thereupon the bank resorts to the collateral security and sells the shares of stock. It would necessarily follow that the new holder of the stock could force payment into the treasury of the corporation of the judgments against the Coryells, affirmed by the dismissal of this writ of error.

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Moreover, I am not convinced that the record is conclusive that the corporation is not indebted at the present time. It shows that several years ago all indebtedness was paid, but not the negative of subsequent indebtedness. Whatever the condition of the corporation was then, does this court know its condition now? Besides, the record shows that the concern is now in the hands of a receiver authorized to carry on its business, to incur indebtedness, to collect money and property due the company, and to make distribution thereof. But, let us suppose, at this time, there are no debts of the corporation, that the Coryells own all the stock, that the receiver is discharged and the Coryells, as a board of directors, cause the corporation to satisfy of record the judgments involved in this suit. Thereupon the stock passes into the hands of others, or the corporation becomes financially involved. Is it at all certain that the new holders of the stock, or the creditors of the corporation would be precluded from forcing the payment of the judgments in question, or a surrender to the corporation of the property claimed herein by Mrs. Coryell? If the property which she holds and claims as her own actually belongs to the corporation, as adjudged by the decree herein affirmed, would it not seem that whosoever acquired ownership of any portion of the capital stock of the company could force a reconveyance of such property to the corporation from one who had been released from such obligation without consideration, by an act of the corporation which was, at the time of the release under the full control of the person released?

But were we to assume that all the parties to the litigation participated in the acts and things which, in the opinion of the court, constitute a settlement of the litigation, it would not, in my judgment, warrant a dismissal of the writ of error. Substantial judgments actually exist against two of the plaintiffs in error. There is no claim that these judgments have in any wise been satisfied or discharged. The only claim is that Miss Fawcett was satisfied in some way. Neither should the writ be dismissed, though it be true that one of the purposes

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thereof, in conjunction with the confession of errors, was to deprive Campbell and De Lan of that which was their just due. Their fees were earned in the trial court, not in this. The proceedings here constitute a new suit and the employment of attorneys in the court below does not constitute them attorneys in the proceedings here. It is quite true that attorneys should be paid for their services, and Campbell and De Lan are entitled to theirs, and may receive them in a proper proceeding either in the court below, or, perhaps, by intervention in the proceeding here. If the allegations of the complaint and the admissions of the answer disclose a certain state of facts, and these attorneys have rendered services justly chargeable under such facts, to the corporation itself, it would necessarily follow that the corporation would be estopped, as between itself and the attorneys, from denying the existence of such facts. A reversal of the judgment would send the matter into the district court, possessed of full jurisdiction in the premises, where all parties could be heard and the matter properly adjusted.

But it is said that the writ of error is not prosecuted in good faith; that its purpose, together with the confession of errors, was to secure a reversal of the judgment and a dismissal of the complaint, and that it was unnecessary to bring the case here, as that could have been accomplished in the district court, or at least a settlement therein made. If it is meant by this, that the district court could have rendered the relief a judgment of reversal would afford, a sufficient answer thereto is, that the term of the district court, at which the decree was entered, had expired prior to the time that Miss Fawcett concluded that she was in the wrong. The district court was, therefore, powerless to set aside, change or modify its decree in any particular. Again, how could a settlement have been made in the district court? The Coryells constituted the board of directors of the corporation. The judgments are against them and in favor of the corporation. Under these circumstances, it is probable that neither the Cory-

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ells nor the corporation itself could safely discharge or satisfy the judgments without payment thereof. Nor is it certain that Miss Fawcett possessed that power. She was, in legal effect, a trustee for the corporation, suing for herself and those similarly situated. However, were we to assume that the entire matter could have been adjusted in the district court, because it was not, is this court to dismiss the writ of error, thereby affirm the judgment, and thus impose upon the Coryells a payment aggregating over $71,000 in money and property which they claim they do not owe? Would it not be wiser and more consonant with sound judicial procedure to reverse the case and let the entire matter be inquired into where all parties may be heard, a full inquiry had, every one's rights protected and substantial justice done?

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[No. 7810.]

## NATIONAL SURETY CO. v. THE PEOPLE.

1. PLEADINGS—*Construed*—A complaint upon a bond given in certain appeals from a magistrate's court to the county court averred that after such removal of the causes to the county court each of "said actions" was dismissed. In view of other allegations manifestly importing that the causes were still depending, "actions" was construed to mean "appeals."

2. ——The bond provided that the principal should pay any judgments that might be rendered upon dismissal or trial of the appeals, "or" surrender herself in satisfaction thereof. The complaint averring simply non-payment of the judgments, without specifically negativing the condition following the disjunctive "or," was held sufficient. The surrender of the principal would have satisfied the judgments, and they would not have remained "due and unpaid," as the complaint alleged.

3. ——*Waiver*—Uncertainty or ambiguity in a pleading if not assailed by demurrer or motion is waived.

4. EVIDENCE—*Admission by Conduct*—Delivery of an appeal bond by the surety therein, with, a signature affixed purporting to be that of the principal, and the filing thereof by the principal, is sufficient evidence of the verity of such signature.

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5. PRINCIPAL AND AGENT — *Agent's Authority — Presumptions* — There is a presumption that a known agent acts within his authority. Defendant, a surety company, by its local agent delivered to a magistrate an appeal bond. The magistrate rejected it as not in form, requiring certain changes. The agent returned the bond, with changes which were material and changed the character of the obligation, writing to the magistrate that he "had corrected the bond," and that it would be delivered by the appellant's attorney. It was so delivered and accepted by the magistrate. The local agent was employed for the purpose of obtaining such business. It was his duty to furnish similar bonds whenever satisfactory opportunity presented itself. He had the apparent as well as the real authority to deliver the bond of the company. It was held that the magistrate had the right to presume that the agent was acting within his authority, and that the company should not be heard to deny the bond, in view of the fact all that the agent did was, to all appearance, what he was authorized to do.

6. VOLUNTARY BOND—*Validity*—A voluntary bond, given upon consideration, not prohibited by law, binds the surety, though not in statutory form.

*Error to Gunnison District Court.*—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. GEORGE Q. RICHMOND and Mr. J. M. MCDOUGALL, for plaintiff in error.

Mr. DEXTER T. SAPP and Mr. JAMES B. NASH, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

The action below was on an appeal bond given by one Mrs. Curley, with the plaintiff in error as surety. Mrs. Curley had been convicted in a police court in eleven different cases for violations of an ordinance of the town of Marble. A fine was assessed in each case. The fines aggregated $3,200.00, for which amount the bond was given. While there was but one bond, the recitals therein showed the charge and conviction, and the amount of the fine in each of the eleven cases, and that an appeal was taken in each and the

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bond, by apt words, was made to apply in each of the appeals. That is, while there was but one instrument, yet it was intended to be in effect the same as eleven bonds, for the amount of the fine in each case, to be used in each case for the purpose of appealing it. Upon the filing of the bond, proceedings were stayed in the police court, and the cases were transmitted to the county court as is done in such appeals. Thereafter, as we think sufficiently appears from the record, the appeals were dismissed in the county court and a *procedendo* issued to the police court. Mrs. Curley failed to pay the fines and an action was brought to recover on the bond, which, after a trial to the court, resulted in a judgment against the surety.

It was urged by demurrer and otherwise in the court below, and is urged here, that the complaint did not state facts sufficient to constitute a cause of action. This objection seems to be based in this court on two grounds:

1. The complaint alleged that after the cases were taken to the county court such action was had in that court that each of the "said actions" was dismissed. The contention is that it appears in the complaint that the actions, or suits, or causes were dismissed, and that therefore no cause of action was stated. This would be true if the word "actions" was used in the complaint in the sense of suits, or causes, or in the sense it is used in our code when referring to a civil action, for if these were dismissed the judgments would have been wiped out. It is clear that the word "action" was not used in that sense in the complaint, for immediately thereafter it speaks of each of "said causes" as having been remitted to the police court, and alleges that Curley failed and refused to pay the judgments and that each of the judgments was still due and unpaid at the time of the filing of the complaint, all of which was admitted by the answer. If the causes, the suits, the civil actions, (for they were civil actions,—*Greeley v. Hamman,* 12 Colo. 94; *Weiss v. The People,* 39 Colo. 374), were dismissed, and it was intended to so allege in the com-

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plaint, then the allegations concerning the remission of the causes, and that the judgments were still due and unpaid, would be altogether wrong and at variance with the preceding allegations. It is fairly clear that the pleader, when speaking of the suits or civil actions, used the word "causes," and by the use of the words "said actions" was referring to the actions of Mrs. Curley, which had been mentioned, and those actions were taking the appeals in each of said cases. So that when the complaint said that "said actions" were dismissed it meant that " said appeals" were dismissed. At the trial, the complaint seems to have been so treated, for while the attorney who tried the case was quite specific in mentioning defects in the complaint, the alleged defect as now specified was not mentioned. At most the complaint might be said to be ambiguous in that particular. If it was, the defect has been waived, for it was not raised by demurrer on the ground of uncertainty or ambiguity, nor by motion to make more certain.

2. The bond was conditioned that if Mrs. Curley should prosecute the appeals with effect and pay off any judgment or judgments that might be rendered by the court, upon dismissal or trial of the appeals, or would surrender herself in satisfaction of any such judgment or judgments, and if she would appear before the county court on the first day of the next term, and be and remain at and abide the order of the county court, and not depart the court without leave, etc., then the bond to be void, otherwise in full force and effect. The contention in this court seems to be that the complaint should have negatived all the conditions, whereas all it said was that Mrs. Curley failed and refused to pay the judgments, or any part thereof, and that the said judgments and each of them were still due and unpaid. No such contention was made in the lower court. It was there contended that the complaint only negatived the payment of the judgments; whereas, as was said, it should also negative the condition that Mrs. Curley would surrender herself in satisfaction of

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the judgments. Now, it is plain that the conditions in the bond that are joined by the word "and" must all be performed and the violation of any one of them would be a breach. The conditions relative to the prosecution of the appeals with effect, and the payment of the judgments and the appearance before the county court, were all of this kind. Each one of them had to be performed. The only condition preceded by the word "or" is the condition relative to the surrender of Mrs. Curley in satisfaction of the judgment. There is no doubt that in the lower court the company took the position that the conditions joined by the word "and" were all to be performed and that the only other condition besides the one of payment that had to be negatived was the condition concerning the surrender of Mrs. Curley. If it was necessary to negative the latter condition, that has been done in a manner sufficient to withstand a general demurrer. The allegation that the judgments were due and unpaid negatived the idea that Mrs. Curley had surrendered herself in satisfaction thereof, for if the judgments were satisfied by Mrs. Curley's surrender they were not due and unpaid. The answer admitted that the judgments were due and unpaid, thus further negativing the idea that they had been satisfied in any manner. It is also contended that no proof was offered that Mrs. Curley signed the bond. The proof showed that Mrs. Curley's name was signed to the bond and the bond was delivered by the company's agent with the signature on it. The bond was filed by Mrs. Curley with the magistrate for the purpose of securing the appeal and a consequent stay of the proceedings, and such appeal and stay were secured. Such evidence is sufficient proof that Mrs. Curley signed the bond. The real defense below and the contention here is that the company never executed the bond sued on. The company had a local agent at Glenwood Springs. Upon application of Mrs. Curley, or her attorney, to this local agent, a bond for $3,200.00 was executed in the name of the company by one Toncray, its attorney in fact. This bond was sent to the local agent, and

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through him was lodged with the magistrate. The latter did not approve the bond because it was not in form to answer the requirements of the situation. It was returned to the local agent, and the magistrate indicated what the situation was and the nature of the bond required. The agent changed the bond to meet the circumstances. It is not necessary to particularly state what changes were made by the local agent. It is enough to say that they were such as to materially change the nature and character of the bond from what it had been. The bond as changed by the local agent was given by him to Mrs. Curley's attorney to be delivered to the magistrate. The local agent wrote a letter to the magistrate informing him that he had corrected the bond and that it would be delivered to the magistrate by Mrs. Curley's attorney. The magistrate received the bond. He did not know in what manner the correction had been made. It cannot be said from this record that the magistrate knew that the local agent had corrected the bond by changing it himself, or by sending it to another agent to be changed. He approved the bond, knowing that it came to him from the local agent apparently duly executed by the company, and proceeded with the appeals as the law required. That the local agent had the authority to deliver bonds executed by the company is undisputed. The company was in the bonding business and all of its business was conducted by agents. The local agent was there for the purpose of obtaining such business, and when a satisfactory opportunity presented itself to furnish a bond, it was his business to see that it was furnished. The presumption is that one known to be an agent is acting within the scope of his authority.—*Austrian & Co. v. Springer,* 94 Mich. 343. The local agent was known to the magistrate to be such agent. The local agent had the apparent as well as the real authority to deliver such a bond executed by the company. The magistrate had the right to presume that the agent was acting within the scope of his authority and did deliver a bond executed by the company, and the company cannot be permitted to say

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that the agent did not do that which it had authorized him to do, when that which he did was to all appearances that which he was authorized to do.

It is also contended by the company that the bond is not in statutory form and that such a bond was never before filed in a court. This may all be true, but it is not necessary to dwell long upon this contention. As a matter of fact, through the instrumentality of this bond, as was intended, proceedings were stayed in the magistrate's court in all of the cases, and they were transmitted to the county court. It was entered into voluntarily. It was an obligation founded on a valuable consideration and which consideration was delivered. By its terms, for this consideration, the board recited that if the appeals were dismissed and Mrs. Curley did not pay the judgments or surrender herself in satisfaction thereof, it would remain in full force and effect. It was not against public policy. The company had the right to enter into such an obligation whether in statutory form or some other form, and having done so, and having received the consideration therefor, the bond is enforcible according to its terms and provisions.—*Abbott v. Williams,* 15 Colo. 514; *Dry Goods Co. v. Livingston,* 16 Colo. App. 257.

Perceiving no error in the record, the judgment is affirmed. *Judgment affirmed.*

MR. JUSTICE GABBERT and MR. JUSTICE HILL concur.

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[No. 6909.]

## LIUTZ V. DENVER CITY TRAMWAY CO.

1. CONTRIBUTORY NEGLIGENCE—*Examples*—Deceased stepped so immediately in front of a street car that it was impossible to prevent injury to her. Those in charge of the car did everything that could reasonably be expected of them to avoid the collision. Her death gave no action.

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2. ——*Last Clear Chance*—In order to the application of the doctrine of the "Last Clear Chance" the circumstances must present a clear chance to avert injury by the exercise of reasonable care. All the circumstances are to be considered. One who, without fault on his part, is presented with the sudden appearance of instant and awful danger to a human being is not culpable for merely failing to manifest the same presence of mind, or exercise the same care and effort, as might be expected in an ordinary situation.

3. INSTRUCTIONS—*Repetition*—Unnecessary repetition in the charge to the jury, though reprehensible, is not necessarily error; e. g. the frequent repetition of the phrase "verdict for the defendant" is not prejudicial, where the facts warranting such a verdict are clearly defined.

4. FAIR TRIAL—*Evil Practice to Influence Jurors—Duty of Court and Attorneys*—If it is made to appear that persons employed by a suitor hang about the purlieus of the court, and the approaches thereto, mingle with those summoned as jurors, converse with them touching causes in which the suitor is concerned, and by flattery, ridicule, and like insidious means, endeavor to improperly influence them, the court has power to punish and suppress the practice, and should not hesitate to employ drastic measures to that end.

And it is the duty of attorneys who have knowledge and evidence of such scandalous practices, to bring the matter to the attention of the court, and co-operate in suppressing the evil.

A verdict shown to have been influenced by such practices should be unhesitatingly vacated.

5. NEW TRIAL—*Affidavits of Jurors*, as to the ground upon which the verdict was reached, will not, as a general rule, be received to impeach it.

6. ——*Improper Remarks to Jurors*, which manifestly had no effect upon their deliberations is not ground for a new trial.

7. ——*Treating Jurors*—That the attorney of the successful party treated four of the jurors to cigars, after the verdict, merely in a way of civility, and without any design or forethought, *held*, no ground to vacate the verdict, though the court suggested that, upon ethical grounds the act of the attorney was indiscreet.

*Error to Denver District Court.*—Hon. HUBERT L. SHATTUCK, Judge.

Messrs. STARK & MARTIN, Mr. GEORGE S. REDD and Mr. GEORGE STIDGER, for plaintiff in error.

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Mr. GERALD HUGHES and Mr. HOWARD S. ROBERTSON, for defendant in error.

Mr. JUSTICE MUSSER delivered the opinion of the court:

This cause was in this court before and the former opinion is reported in 43 Colo. 58. The facts relative to the accident, in which the wife of the plaintiff in error received injuries which caused her death, are substantially the same in this record as narrated in the former opinion.

Mrs. Liutz, a young and vigorous woman, started diagonally across Larimer street, in Denver, near its intersection with Twenty-fifth street, obviously intending to board an approaching car at the usual place on the opposite side of Twenty-fifth street. She was carrying a small child in her arms, and as she proceeded she signalled the car. A gong was sounded. She stepped upon the track immediately in front of the car, was struck by the fender or rail guard, which projected forward from the front of the car over the rails, fell upon it, struggled an instant and then fell from the fender on the right side in the space between the fender and the front wheel. She stepped upon the track at about the middle of Twenty-fifth street. The car was running slowly, evidently slowing up to make the stop on the opposite side, for there was evidence that the brake had been applied. There was nothing in the situation to indicate to the motorman that she was about to attempt to cross the track before the car had passed her. Her signals indicated that she knew the car was approaching, and the gong reminded her of that fact. The car was moving at a lawful rate of speed. The brakes were in good order. One witness testified that the car was five or six feet from her when she stepped upon the track, and another that it was not more than seven or eight feet away. The motorman testified that he was not more than six feet from her. These witnesses evidently estimated the distance with reference to the body of the car. Another testified that the projecting fender was not more than fifteen inches from

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her. Another testified that she was struck when she was about to step on the track and when she stepped on the track. So that she must have been struck by the fender almost the instant she stepped on the track. The motorman immediately further applied the brake and the car was stopped within eight or ten feet after she was struck. When the car was stopped Mrs. Liutz was lying on her stomach and the front wheel was resting between her limbs, near the trunk, or on the right limb and pelvis at the junction with the thigh on the side toward the rear of the car. Her trunk was outside of the rails and the limbs were resting upon them. The motorman and conductor immediately jumped off when the car stopped, and, after looking, decided that it was necessary to get the car off the body before it could be taken out. The car was backed very slowly twelve or eighteen inches and Mrs. Liutz was then easily taken out and removed to a hospital where she died the next day. Her right limb was fractured below the knee and there was another injury at the junction of the right thigh and pelvis, including both of them somewhat.

There were two causes of action in the complaint. The first was based upon negligence in operating the car, in not stopping it in time to prevent the injury, and in not dropping the fender so as to prevent the body of Mrs. Liutz from getting under the car. The second cause of action alleged the same things except with reference to the fender, and further alleged that the injury was inflicted by negligently backing the car after it had stopped. The lower court directed a verdict for the defendant company on the first cause of action, and submitted to the jury the second cause of action with reference to the backing of the car, and the jury returned a verdict for the defendant company. It is contended that the court erred in directing a verdict for defendant on the first cause of action. In the former opinion it was held that up to the time the car stopped the company was not guilty of any negligence and that the injury to Mrs. Liutz by the forward mo-

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tion was due entirely to her own negligence in stepping upon the track immediately in front of the car.

Upon reading the record now before us, we are not inclined to change the view of the matter heretofore announced, and the reasons are so fully discussed in the former opinion that it is unnecessary to discuss them here. Upon reading the whole record, it appears clear that only one conclusion can be drawn from the evidence, and that is, that any injury which was inflicted upon Mrs. Liutz by the forward motion of the car was due solely to her own act in stepping upon the track so immediately in front of the car that it was impossible to prevent injury to her, and that the motorman did all that in reason could have been expected of him. It is contended that even though Mrs. Liutz was negligent in stepping upon the track, the evidence showed that the front end of the fender was about a foot above the rails and if the motorman would have dropped it, as he might have done, she would not have gotten under the car, or at least there was a chance for the jury to say she would not. Many authorities are cited to the effect that notwithstanding the negligence of a plaintiff, if the defendant observed or should have observed such negligence in time to avert injurious consequences by the exercise of reasonable care, it is the duty of the defendant to exercise such care. That is commonly called the doctrine of last clear chance. This can be answered in two ways. It clearly appears from the evidence of all the witnesses who testified with any knowledge of how Mrs. Liutz fell from the fender that she did not fall from it in front so that it would pass over her, but that she fell off at the side in the space between the fender and the front wheel. Under these circumstances it is unlikely that the dropping of the front end of the fender would have availed anything.

If we are wrong in this it nevertheless is plain that in order to apply the doctrine mentioned to a state of facts the circumstances must be such as to present a last clear chance to avert injury by the exercise of reasonable care. In this

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case the situation itself, as detailed by the witnesses, clearly indicates that there was not a fair opportunity, or any opportunity within reason, for the motorman to have overcome the consequences of Mrs. Liutz's act. These circumstances clearly show that her stepping on the track and falling from the fender were practically simultaneous, and that her negligence occurred for all practical purposes simultaneously with her fall from the fender and under the car. The circumstances, the suddenness of the whole transaction, the practically simultaneous occurrence of her negligence and her falling under the car excluded the idea of any chance for the motorman to have saved her. The facts and circumstances were clear and undisputed, fixed and unalterable, and no expert testimony could throw any light on them or change their inevitable result. To say that there was a chance would be to require of the human mind and muscle a rapidity and unerring precision of thought and action of which they are incapable, especially when that mind must have been shocked by the sudden appearance of instant and awful danger to a human being. Under such circumstances, what might be done in an ordinary situation, when there is no danger apparent or imminent, is inapplicable. The case of *Weitzman v. Nassau E. R. Co.*, 53 N. Y. Sup. 905, which the plaintiff in error says is exactly in point here, is entirely different in its facts. There, the motorman testified that he saw the child twenty feet away on the track before it was struck by the fender, and the child was carried a distance of from thirty-two to one hundred and fifty feet on the fender. After the motorman saw the child the car ran at least fifty-two feet, while the motorman testified that the car could have been stopped in forty-five feet. Such a state of facts is altogether different from the situation presented here, and this remark is applicable to the many other authorities cited. In *Griffith v. Tramway Co.*, 14 Colo. App. 504, the circumstances with reference to the stepping upon the track and the suddenness of the collision were substantially the same as here, and it was

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there held that "the facts which would warrant an application of the doctrine, invoked by counsel, of a liability for an injury notwithstanding the negligence of a person injured, did not exist."

As has been said, the contention that the fatal injuries were caused by negligently backing the car was submitted to the jury. Complaint is made of several of the instructions given at the request of the defendant. In each of them the jury were told that if they found a certain state of facts the verdict should be for defendant. There was some repetition in the instructions, but it cannot be said that any one was the counterpart of the other. It is claimed that what repetition there was tended to confuse the jury, and that the frequent use of the phrase "verdict for defendant" gave undue prominence to the idea that the jury should so find. Each instruction was clear enough in itself and no claim is made that any of them incorrectly stated the law or recited facts not deducible from the evidence. Many authorities are cited showing that repetition in the instructions is to be avoided. All of them, however, save one, are to the effect that it is not error to refuse a correct instruction when the charge already contains the same thing expressly or substantially. This is undoubtedly good law, but that is far from saying that repetition is reversible error. In the one case of *State v. Legg*, 59 W. Va., 315, the court condemned the practice of repetition in instructions, but refused to say whether it was reversible error or not, and did not intimate what it would do in that behalf were it necessary. Of course unnecessary repetition in the charge is to be condemned, but that is not saying that it must be regarded as reversible error. It might become so if it tended to confuse the jury. In the present case, however, the instructions, even with the repetition they may have contained, cleared confusion rather than produced it. The conflicting claims of plaintiff were likely to produce confusion. It was first contended that the fatal injury was inflicted by the car before it stopped in its forward motion, and next that

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it was inflicted, not by the forward motion, but by negligently backing it after it had stopped. The testimony introduced by the plaintiff to support each of these claims was blended together. Now the fact was that the plaintiff could not recover on his first contention because in that case the injury would have been caused by the negligence of Mrs. Liutz, and if that contention were true the second could not be, and if the second contention were true the first could not be. It was very likely that such a state of affairs would produce confusion in the minds of the jury and it was very proper for the court to give instructions that would place the matter clearly before them in its various phases. This is what the instructions did. The plaintiff was not entitled to have the confusion which he created continue with the jury, while the defendant was entitled to have the matter fairly presented to them. We cannot say that the repetition of the phrase "verdict for the defendant" would prejudice them when the facts were clearly presented upon which such a verdict should be based. If they did not find the facts as predicated in any of the instructions they certainly knew that their verdict should not be for the defendant, and if the facts were as predicated they could not render any other verdict.

In the motion for a new trial it was alleged:

1. That the Tramway Company made it a practice to keep two men about the court house to mingle with prospective jurors, talk with them particularly with reference to Tramway cases, and by flattery, ridicule and other insidious means endeavor to improperly influence them so that verdicts might be returned for the company.

2. That one of the jurors in this case had been informed that if a verdict was not reached before bed-time the jury would be compelled to sleep over night in beds infected with vermin, and that rather than sleep in such a bed the juror, against his will, agreed to the verdict for the defendant.

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3. That the attorney for defendant was guilty of misconduct in treating the jurors to cigars after the receipt of the verdict.

When these charges were brought to the attention of the court, an investigation was ordered and plaintiff was directed to produce his evidence. A hearing was had, much testimony was taken, and the court found that the charges were not sustained and overruled the motion for a new trial. Unless the finding of the court was manifestly against the weight of the testimony, or its discretion was abused, we can not disturb this finding. It is enough to say that in the cold record before us there does not appear sufficient evidence to sustain the charges. The district judge saw the witnesses on the stand, observed their demeanor, interrogated many of them himself, and was much more competent to judge of their testimony than an appellate court. If the first charge were true, that the Tramway Company made it a practice to influence jurors as alleged, such a practice is to be condemned in the severest terms. The district court, in such a case, has it within its power to severely punish any who may resort to such an evil practice, and should not hesitate to employ drastic measures to stamp it out. It is the duty of attorneys of the court, who are aware of such conditions and have evidence thereof, to co-operate with the court in bringing offenders to punishment and in putting a stop to such a condition of corruption. Verdicts influenced thereby should unhesitatingly be set aside. However, before anything can be done sufficient evidence must be produced. Men cannot be punished or verdicts set aside for such a reason upon mere suspicion and without evidence. If there is any evidence at all in this record of such a practice it is very meager indeed, and there is no evidence whatever that the jurors in the present case ever heard of it or were in any manner influenced in their present verdict thereby. On the contrary, it affirmatively appears, uncontradicted, that the jury was free from such an influence. An affidavit of the juror, who claimed that his verdict

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was induced by what he had heard of the condition of the beds, was filed to support that charge. Section 236, Rev. Code, provides when an affidavit may be used to impeach the verdict of a jury, and this court has held that no affidavit of a juror will be received to impeach the verdict for misconduct of the jury except as provided in that section, and that is when the verdict is brought about by a resort to the determination of chance. *Richards v. Richards,* 20 Colo., 303. The particular misconduct that is sought to be charged to the jury in this case was that there was some conversation to the effect that if a verdict was not reached they would have to sleep in beds infected with vermin. As a general rule, affidavits of jurors stating the ground upon which they rendered their verdict will not be received to impeach it.—*Wray v. Carpenter,* 16 Colo. 271. In the hearing on the motion for a new trial each of the other eleven jurors were interrogated with reference to this matter. Many of them said that they heard some remarks with regard to vermin in the beds, but it did not seem to make any impression upon them, and some of them regarded the talk more in the nature of a joke. The verdict was rendered immediately after the evening meal, quite a while before bed-time and before the juror would know that he was to sleep over night in the beds provided by the county. He did not know that the beds were in such a condition. He did not attempt in any way to have the authorities provide proper beds. There was nothing in the situation to alarm him, or to cause him to violate his sworn duty as a juror. There was no error committed in overruling the motion on that ground.

The facts with reference to the treating of jurors with cigars appears to be as follows: The jury agreed on their verdict in the evening, sealed it and dispersed to their homes. The next morning they returned the verdict into court. It was received and they were dismissed. After this, in going down the elevator to the lower floor of the court house, defendant's attorney and some of the jurors were together.

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Someone said something about cigars, and, on reaching the floor where they were to be obtained, the defendant's attorney treated each of four jurors to one cigar. There is no statute in this state forbidding such a thing. The occurrence seems only to have been an innocent one, and is the only one of its kind shown in this record. How it could have influenced the verdict which had been returned and received can not be conceived. The cases cited by plaintiff in error are not in point. The Vermont cases, *Baker v. Jacobs,* 23 Atl. 588, and *Shattuck v. Wrought Iron R. Co.,* 38 Atl. 72, were based upon a statute. In *Marshall v. Watson,* 40 S. W. 352, one of the parties during an adjournment and while the case was on trial entertained two of the jurors at a restaurant. Afterward the verdict was returned in favor of the host. In *Johnson v. Hobart,* 45 Fed. 542, and *Ensign v. Harney,* 18 N. W. 73, the matter occurred before the cases were submitted to the juries for verdict. In *McLaughlin v. Hinds,* 38 N. E. 136, the attorneys for each party and some of the jury entered a saloon and indulged in cigars and drink after the verdict. The court refused to set the verdict aside because each party was guilty, and said it would not hesitate to do so if the attorney for the successful party had been alone with the jury. The remark did not apply to the actual facts in the case and besides the conduct of the attorneys and jurors was flagrant, and was enough to show, if participated in by the successful attorney and the jurors, that the latter were so prejudiced in his favor as to taint the verdict. The conduct complained of occurred after the verdict was reached and sealed and before its return into court. In *End. R. of O. of K. P. v. Steele,* 63 S. W. 1126, some of the jurors, when examined for service, had answered that they had not served on a jury within two years, when the fact was that they had and were thereby rendered incompetent. This fact was linked with the fact that they drank with the brother of the plaintiff after the verdict to show that they were anxious to sit upon the case and that they were not the fair and impartial jurors that the par-

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ties had a right to demand. *Scott v. Tubbs,* 43 Colo. 221, was a condemnation proceeding. After the jury had viewed the premises and before they returned to the court room or made their award, four of the jurors accompanied the petitioner, at his invitation, to a saloon and drank with him. This court correctly held that a new trial should have been granted. Courts should guard the purity of the jury with jealous care and see to it, as far as within them lies, that jurors are not tampered with so that the verdicts that are returned may be free from taint and prejudice and be the honest convictions of the jury upon the law and the evidence. Too great a care in this behalf cannot be taken, yet at the same time courts should not misconceive their duties and go so far as to work injustice. In *Vane et al. v. City of Evanston,* 150 Ill. 616, the rule was announced:

"That customary offices of civility, and ordinary hospitality or courtesy, extended by the successful litigant, when not designed or calculated to influence the juror or jurors in their consideration of the case, and which are devoid of suspicion, will not afford sufficient ground for setting the verdict aside and awarding a new trial."

And in *Gale agt. N. Y. C. & H. R. R. R. Co.,* 53 Howard's Prac. 385, it is said:

"When, however, the court is satisfied that there has been no attempt by the successful party to unduly influence a juror, either by conversation or by placing him under obligations, and that his action has not in fact been improperly influenced, then, even though the act may have been indiscreet, the court will not disturb the verdict."

These utterances of the courts and others of like character are quoted and the principles therein announced followed in the case of *Mo. Pac. Ry. Co. v. Bowman,* 75 Pac. 482 (Kans.). There is an entire absence of any indication that the attorney for the defendant treated the jurors to cigars, in any other spirit than one of civility, hospitality and courtesy that came to him on the spur of the moment after the verdict,

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without any design or forethought, but upon a jocular suggestion, as such things often innocently occur. It does not appear that is was customary for him to do so, or that the jurors bore such relations to him that they expected it of him. The act is entirely devoid of suspicion. It could not have influenced a verdict already rendered. It might be said, upon ethical grounds, that the act of the attorney was indiscreet, but that affords no reason for setting aside the verdict. The judgment is affirmed.

*Judgment affirmed.*

Mr. JUSTICE WHITE and Mr. JUSTICE GARRIGUES concur.

Decided January 6, A. D. 1913 .Rehearing denied April 7, A. D. 1913.

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[No. 6968.]

## SPRINGHETTI ET AL. V. HAHNEWALD ET AL.

1. PLEADING—*Waiver*—A demurrer for a misjoinder of plaintiffs is overruled. Defendants answer and proceed to trial. The misjoinder is waived.

Misjoinder of plaintiffs, not appearing by the complaint, may be taken advantage of by answer. If not so brought in question it is waived (Mills' Code, Sec. 55, Rev. Code, Sec. 61).

2. BODY JUDGMENT—*Rescission of Contract for Fraud.* One who by fraudulent misrepresentation has been induced to enter into a contract may either have his action for the deceit, or rescind the contract and recover what he has paid. Relief in either form of action is grounded upon the allegation of fraud, and, prevailing in an action to rescind, he may, under the statute (Rev. Stat., Sec. 3024), have execution against the body. The rescission of the contract is no waiver of the fraud.

3. EVIDENCE—*Fraud*—The defendants induced plaintiff to purchase an interest in a worthless mine by falsely representing, among other things, that one of them had paid to the other a large sum of money for an interest in the property, exhibiting a check for the sum mentioned. In fact the check was drawn upon a bank where the drawer had no funds, and after the accomplishment of the fraud was

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surrendered. In an action to rescind the purchase it was held that evidence of this false representation was properly admitted; that the rule that false representations by vendor as to what he has paid for what he proposes to sell, had no application.

4. PRACTICE IN SUPREME COURT—*Harmless Error*—Plaintiffs, by false representations of defendants, had been induced to purchase from one of them an interest in a leasehold of a worthless mine, and from the other an interest in an option from the owner of the same premises. Under this option so assigned to them, plaintiffs, moved by the same false representations, had purchased an interest from the owner, paying therefor a large sum of money. In an action by plaintiffs to rescind the transaction the district court allowed them the money obtained by defendants, but refused to make any award in respect of what had been paid by plaintiffs to the owner. This was assigned for error, as permitting a rescission in part; it being contended that plaintiffs should have been required to restore to the defendant owning the option, what they had purchased thereunder. *Held*, that as this would have required defendants to pay plaintiffs a large sum of money for what was of no value, the error if any was to the advantage of defendant, and not prejudicial.

*Error to Lake District Court.*—Hon. CHARLES CAVENDER, Judge.

Mr. R. D. MCLEOD, Mr. JAMES T. HOGAN and Messrs. BARNETT & TELLER, for plaintiffs in error.

Mr. JOHN A. EWING, for defendants in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

Defendants in error, plaintiffs below, brought an action against plaintiffs in error, as defendants to recover sums of money which, it was charged, had been obtained from them by fraud and willful deceit on the part of the defendants, and also to cancel all indebtedness or claims of indebtedness against the plaintiffs in favor of the defendants growing out of the same transaction. At the time this suit was instituted, there was another action pending by Springhetti against Albert Hahnewald, on a three thousand dollar note which had been given by Hahnewald to Springhetti in connection with

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the above transaction, and it was agreed that that suit should abide the result of the trial of this action. The case was tried before the court, and the issues made by the pleadings found in favor of the plaintiffs, and a finding made that in committing the wrongs complained of in the complaint, the defendants were guilty of malice, fraud and willful deceit, and procured from the plaintiffs the sum of $5,333.33 by means thereof. Judgment was rendered accordingly, which provided that if the amount which the plaintiffs were adjudged to recover from the defendants was not paid within thirty days from the date the judgment was rendered, that then plaintiffs might have an execution against the bodies of the defendants, under which they could be committed to jail for a term of one year, unless the judgment was sooner paid. The defendants bring the case here for review on error.

The complaint alleged that plaintiff, Albert Hahnewald, and defendant, Louis Springhetti, were the owners of an undivided one-half interest each in a lease upon the Chautauqua lode mining claim; that at the same time the defendant, Julius Muller, was the owner of an option to purchase an undivided six-tenths interest in this claim from the owner, by virtue of which Muller was entitled to purchase such interest within a time specified for the sum of $2,400.00; that defendant Springhetti and plaintiff, Paul Hahnewald, were engaged in making preparations to work the property under their lease, and that during this time prospecting was done in a shaft thereon, and workings connected therewith, and that this prospecting was done by one Louis Beati, who took orders from the defendant Springhetti, neither of the plaintiffs having any control or direction over such work, in any way; that defendants, for the purpose of inducing these plaintiffs to purchase from Springhetti his one-half interest in the lease, and the option held by Muller, falsely represented to the plaintiffs that in the workings in which Beati was prospecting, great values in minerals were disclosed, and for the purpose of consummating such fraud, caused material to be taken from these

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workings with which they mixed gold and silver in such manner that assays of such material showed high values; that for the purpose of deceiving and defrauding these plaintiffs, they further falsely represented to them that in workings on the premises there was a large quantity of high grade ore which had been hidden and covered up by material which had fallen from the roof, and also falsely represented to the plaintiffs that defendant Muller and other persons associated with him had paid the sum of ten thousand dollars in cash for the half interest of Springhetti in the lease; that in truth and in fact, the material taken from the premises and assayed was of no value whatever, until the same had been so mixed with gold and silver that an assay thereof would disclose great values; that plaintiffs believed the representations made to them by the defendants in regard to the presence of valuable ore in the mine, and the sale of Springhetti's interest in the lease, and relying upon these representations, they purchased from Muller a two-thirds interest in the lease, and also a two-thirds interest in the option to purchase held by Muller, paying therefor the sum of $6,999.99, and agreed to pay the further sum of $3,000, for which they executed their note. The complaint then alleges that prior to the commencement of the action, and as soon as they discovered the fraud which had been practiced upon them, the plaintiffs notified the defendants that upon the return of the sum of money which they had paid, they would convey to the defendants the interest in the lode mining claim which they had acquired in the lease and the purchase of the option, and by apt statements in the complaint, tendered and offered to assign these interests. The plaintiffs prayed judgment against the defendants for the amount they had paid, and for a judgment cancelling all indebtedness, or claim of indebtedness, against them in favor of the defendants growing out of the transaction, and for a finding, decree and judgment of the court that the defendants were guilty of malice, fraud and willful deceit in the statements and representations made by them in procuring such

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sums of money, and that upon such finding, judgment and order, the plaintiffs have an execution as provided in the statutes of the state of Colorado against the bodies of the defendants, under which they might be committed to jail under writ of execution against their bodies, as provided by law.

To this complaint the defendants demurred upon the ground that there was a misjoinder of plaintiffs, and also upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled. After this ruling the defendants answered. Counsel for defendants contend the demurrer should have been sustained. The objection to overruling the demurrer for misjoinder of parties plaintiff, is not available to the defendants upon this review. By answering and going to trial upon the merits, they waived the right to question the ruling upon the demurrer for alleged misjoinder.—*The Sams Automatic Car Coupler Co. v. League,* 25 Colo. 129; *The Diamond Rubber Co. v. Harryman,* 41 Colo. 415; *City of Canon v. Manning,* 43 Colo. 144.

From the argument of counsel for defendants, we understand the contention is made that the court erred in overruling the general demurrer, for the reason it appears facts are not stated in the complaint sufficient to justify a body judgment against the defendants, in that the action is for a rescission of the contract entered into by the plaintiffs, and for the recovery of the amount paid by them, and while the ground for rescission is deceit, they may not recover as for a tort that with which they parted, as, by electing to rescind the contract, they have waived the tort, and their action is in assumpsit for money had and received, in which character of action a body judgment can not be rendered. Where a party to a contract discovers that he has been defrauded, either one of two remedies is open to him—to rescind the contract and recover that which he has paid, or to sue for damages on account of the deceit. Whichever remedy he pursues, however, is based upon fraud.

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Section 3024, Rev. Stats. 1908, provides that in a civil action, when it shall appear from the pleadings and summons that it is founded upon tort, and judgment is rendered in favor of the plaintiff, and the verdict of the jury or the finding of the court shall state that in committing the tort complained of, the defendant was guilty of either malice, fraud or willful deceit, then, in such case, the plaintiff may have execution against the body of the defendant. In the case at bar the plaintiffs elected to rescind the transaction with the defendants and recover the money which they had been induced to pay by reason of such fraud and deceit, and for the cancellation of all indebtedness to the defendants growing out of the transaction. The basis, therefore, of the right of plaintiffs to rescind was the wrong which the defendants were charged with having committed, and the right to recover that with which they had parted was based upon the same ground; so that it appears clear the action of the plaintiffs was founded upon a tort. In other words, their right of action and the relief which they demanded grew out of an alleged tort, and this, we think, is what the statute means by an action founded upon tort, irrespective of what the action itself might be denominated in legal parlance. This is manifest from the language of the statute, which speaks of an action "founded upon tort." "Founded upon" means the bottom, or foundation, on which something rests or relies; so that, in speaking of an action founded upon tort, one was meant the basis or foundation of which was a tort.

Testimony was admitted, to the effect that Springhetti had represented to plaintiffs that Muller had paid him ten thousand dollars for his interest in the lease, and exhibited to them Muller's check in that sum. This, it is urged, was error, for the reason that a statement of a vendor as to the price paid for an article, though false and made with intent to deceive, will furnish no ground for action. In the circumstances of this case, the rule contended for is not applicable. It appears the Muller check was drawn on a bank, where he

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did not have a cent to meet it, and was afterwards returned to the drawer; that the transaction between Springhetti and Muller, according to testimony adduced, was a mere subterfuge which they pretended was genuine, by the passing of a worthless check pursuant to an understanding between them that it would never be presented to the bank upon which it was drawn, the purpose of which was to cause the plaintiffs to believe that it was a *bona fide* transaction, because the property contained large quantities of valuable mineral. In brief, from the testimony of plaintiffs, it was a farce sale, which was part of a concerted scheme of defendants to induce plaintiffs to believe that the property contained valuable ore bodies. The statement of the sale was relied on by plaintiffs, and as it was an artifice on the part of defendants, in connection with other frauds and false representations made and resorted to for the purpose of deceiving the plaintiffs, it was properly admitted in evidence.

At the conclusion of the testimony, the defendants moved for a non-suit, based upon the ground that the evidence disclosed there was no community of interest between the plaintiffs in the subject of the suit; that is, that there was no joint interest, and hence, they could not maintain a joint action. What the evidence may disclose on this subject, we do not deem it necessary to consider, for the reason it presents the question that there was a misjoinder of plaintiffs. Section 55 of Mills' Code provides, that if an objection to a misjoinder of parties plaintiff be not taken, either by demurrer or answer, the defendant shall be deemed to have waived the same. In the case at bar, the defendants demurred to the complaint upon the ground of misjoinder, but, as previously stated, having answered after this demurrer was overruled, they waived the right to question such ruling. Thereafter they could only raise it by answer, provided, of course, the alleged misjoinder did not appear on the face of the complaint. They interposed no such defense, and, therefore, under the provisions of the code, waived it.—*Keys v. Morrison*, 3 C. A.

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441; *Sams Automatic Car Coupler Co. v. League, supra.*

It is also contended on behalf of defendants, that the evidence is insufficient to sustain the judgment rendered because it does not establish any conspiracy between the defendants, or that they, or either of them, committed the frauds charged. It is unnecessary to undertake a review of the testimony further than to say, that, in our opinion, it is ample to establish the fraud and conspiracy charged in the complaint. There may be some conflict in the testimony bearing on these subjects; but that conflict was decided in favor of the plaintiffs, and, therefore, such finding will not be disturbed on review, when the finding made by the trial court is fully sustained by the evidence.

In the judgment rendered the court decreed that plaintiffs were not entitled to any relief on account of the purchase of the four-tenths interest in the property from the owner, who had given an option to purchase her interest to Muller. This, it is urged, was error, for the reason that it allowed the plaintiffs to affirm in part and rescind in part; that is to say, if plaintiffs were entitled to rescind, the judgment should have required them to rescind in toto by restoring to Muller his option to purchase so much of the fee as they purchased under the option. It appears from the testimony that plaintiffs purchased their interest in the title to the property from the owner direct, and paid her the money therefor, so that none of this purchase money ever came into the hands of the defendants. Such being the case, the trial court evidently determined that they should not be held for the amount of such purchase. If this was error, it was in favor of the defendants, because if they were entitled to be placed in *statu quo* in respect to the option, then they should have been required to repay the plaintiffs the amount which they had expended in securing title to the four-tenths interest. This would have increased the judgment something like sixteen hundred dollars. The code, section 78, Mills', provides that errors in proceedings which do not affect the substantial rights of the parties shall be disre-

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garded. We have often decided that error without prejudice will not work a reversal on review. The trial court evidently found (and the evidence fully sustains such finding), that the property was practically worthless. Such being the fact, end even if it be conceded that defendants were entitled to be placed in *statu quo,* with respect to the four-tenths interest, they cannot complain when, for such alleged error, they have escaped being required to pay sixteen hundred dollars or more, for that interest which it appears is of no substantial value.

The judgment of the district court is affirmed.

*Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

Decided March 3, A. D. 1913. Rehearing denied April 7, A. D. 1913.

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[No. 7197.]

## MONTEZUMA VALLEY IRRIGATION DISTRICT v. LONGENBAUGH.

1. STATUTES—*Construction*—In the construction of a statute all provisions pertaining to the same subject are to be taken together.

In construing the proviso to sec. 1, of the act for the organization of irrigation districts (Laws 1901, c. 87) the first proviso to section 2, that the county commissioners shall not modify the boundaries of a proposed district so as to exempt from the operation of the act any territory within the proposed boundaries "which is susceptible of irrigation by the same system of works applicable to other lands in such proposed districts"; as well as the second proviso in the same section that "any person whose lands are susceptible of irrigation from the same source shall, upon application to the board, be entitled to have his lands included in said district," are to be taken into consideration.

2. ESTOPPEL—*By Conduct*—Plaintiff sued to restrain the collection of irrigation district taxes upon certain lands, and for a decree that his lands were no part of the irrigation district. His complaint alleged, and the court found, that prior to the organization of the dis-

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trict, and ever since, he was the owner of water rights sufficient for the irrigation of his lands, and which he had always since applied to this purpose; and that the district was not formed to acquire such water rights, and had not acquired them; upon account of which facts the plaintiff claimed that he was within the proviso to the first section of the act under which the district was organized (Laws 1901, c. 87).

But plaintiff, with full knowledge of the situation, had signed the petition for the organization of the district, which, as therein defined, included the land described in his complaint. During two years following the organization of the district he had paid irrigation district taxes upon said land. Without objection from him, proceedings had been taken, and a decree entered under the act, declaring the validity of the district, and confirming an issue of district bonds. The court were of the opinion that if plaintiff's lands had not been included within the district as proposed, he might, under the last proviso of section 2, have procured them to be included; that his signature to the petition was equivalent in effect to an application under this proviso, was a representation that his lands were such as might under the statute be so included, and a prayer for such inclusion; that the action of the board of county commissioners establishing the district was in the nature of a judgment; and that plaintiff by his conduct was estopped from afterwards denying, or bringing in question, the truth of his own representation upon which the board had taken action, especially in view of the fact that the district had contracted a large indebtedness to supply water to all the lands included therein.

A statute (Act 1901, c. 87) required, as the initiatory step for the organization of an irrigation district, a petition to the board of county commissioners, signed by a majority of the resident free holders who were qualified electors and owners of a majority of the whole number of acres belonging to resident electors, within the proposed district. *Held*, that one who has subscribed such a petition will not be permitted to afterwards dispute the facts therein asserted, even though his name is necessary to make up the required majority.

*Error to Montezuma District Court.*—Hon. CHARLES A. PIKE, Judge.

Mr. W. F. MOWRY, for plaintiffs in error.

Messrs. GOUDY & TWITCHELL and Mr. J. H. BURKHARDT, for defendant in error.

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Mr. JUSTICE HILL delivered the opinion of the court:

This action involves the validity of certain irrigation district taxes upon certain lands included in an irrigation district, organized under our former irrigation district act entitled "An act to provide for the organization and government of irrigation districts," etc., approved April 12th, 1901.

Soon after the approval of this act, which contained an emergency clause, the defendant in error, in conjunction with many other landowners, signed and caused to be presented to the board of county commissioners of Montezuma county a petition praying for the organization of The Montezuma Valley Irrigation District. The boundaries of the proposed district as set forth in the petition included three hundred twenty acres of land owned by the defendant in error. The county commissioners duly considered the petition, made certain findings of fact, and, following the procedure prescribed by the act after the election therefor, declared the district as such duly organized under date of December 4th, 1901. Its boundaries as defined by the board included the above lands of the defendant in error. He paid irrigation district taxes upon them for the years 1904 and 1905. Prior to the institution of this suit, the district had contracted a large bonded indebtedness for a water system for the purpose of supplying the lands in the district with water for irrigation purposes. The regularity of the proceedings relative to the organization of the district and the issuance of the bonds (the evidence of this indebtedness) was duly confirmed by decree of the district court May 12th, 1906, as provided for by the act. No exception was taken to, or appeal from, this decree; no question is raised concerning the regularity of any of these proceedings.

Upon January 13th, 1909, which was more than seven years after the organization of the district, and more than two years after the date of the decree of confirmation, the defendant in error instituted this suit to restrain the district

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board, the county treasurer, and the county assessor from levying and collecting irrigation district taxes upon these lands. He also prays the court to decree that they are no part of the district.

As grounds for this relief he alleges that prior to the organization of the district, and during all times since, he owned and possessed ditches previously constructed of sufficient capacity, and also owned sufficient water rights for the irrigation of this land, which he has ever since been using for the irrigation of all of it, with the exception of about ten acres. He also alleges, and it is conceded, that the district was not organized or formed to purchase, acquire, lease or rent the plaintiff's alleged ditches or water rights, and that it has never made purchase of any of them.

Numerous defenses were presented. The relief prayed for was granted, save and except as to ten acres. The defendants bring the case here for review upon error.

Section 1 of the Irrigation District Act of 1901, p. 198, reads:

"Whenever a majority of the resident freeholders owning lands in any district susceptible to one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act, and when so organized, each district shall have the powers conferred or that may hereafter be conferred by law upon such irrigation district. *Provided,* That where ditches, canals or reservoirs have been constructed before the passage of this act of sufficient capacity to water the land thereunder for which the water taken in such ditches, canals or reservoirs is appropriated, such ditches canals, reservoirs and franchises and the land subject to be watered thereby shall be exempt from operation of this law, except such district shall be formed to make purchase of such ditches, canals, reservoirs and franchises, and that this law

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shall not be construed to in any way affect the rights of ditches, canals and reservoirs already constructed."

It is claimed that the lands of the defendant in error come within the proviso in the above section and are therefore exempt from the operation of the act, the district not being formed to make purchase of the ditches, etc., in existence at the time of its organization, used for the irrigation of this land. There is evidence concerning previous ditches, their enlargement since the organization of the district, also evidence concerning what is termed private water rights used in the irrigation of a portion of this land. It is conflicting. If this was the only question raised, it might be proper to sustain the judgment, but a more serious difficulty confronts us.

The defendants plead and introduced evidence to sustain an estoppel. It has universally been held in the construction of a statute that all matters therein pertaining to the same subject should be considered in connection with each other. This rule is especially applicable here for the reason that when the different sections and provisos in this act are read separately and thus considered literally, they cannot be harmonized, but are in conflict and inconsistent with each other. Section 2 provides that a petition shall be filed with the board of county commissioners which embraces the largest acreage of the proposed district, signed by a majority of the resident freeholders who are qualified electors of the proposed district, who shall also own a majority of the whole number of acres belonging to the resident electors of the proposed district; that the petition shall set forth and particularly describe the boundaries of the district, and shall pray that the lands included therein be organized into an irrigation district under the provisions of the act. Also, that when the petition is presented, the board of county commissioners shall hear it, and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define the boundaries, provided that said board shall not modify said boundaries *so as to exempt from operation of the*

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*act any territory within the boundaries of the district proposed by said petitioners, which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district;* nor shall any land, which will not in the judgment of said board be benefited by irrigation by said system, be included in such district. Another proviso in this section states, "*That any person whose lands are susceptible of irrigation from the same source shall, upon application of the owner to said board, be entitled to have such lands included in said district.*" Sections 9 and 10 provide what the board can do in securing sundry systems of water works, etc., for the irrigation of the lands in the district, etc. Section 13, for the issuance of bonds, etc. Sections 29 to 38, inclusive, provide for changing the boundaries of the district after its organization, and allowing, under certain conditions, contiguous territory to be included therein.

It is admitted that the defendant in error voluntarily signed the petition for the organization of the district; that the petition set forth the boundaries of the proposed district, which embraced therein the three hundred twenty acres of land in question; that when he signed it he was the owner of this land and that he knew the contents of the petition. He thereby prayed that the proposed district as then defined, which included this land of which he was then the owner, be organized into an irrigation district under the provisions of this act. Thereafter, during the years 1904 and 1905 he paid irrigation district taxes thereon and thereby again recognized the proper inclusion of these lands in the district.

It also appears that in 1906 proceedings for the approval of the validity of the district and the confirmation of certain bonds were had and became final to which he made no objections, although the regular statutory notices were given of these matters, yet not until over two years thereafter, and until after a large indebtedness had been contracted by the district for the purpose of supplying the lands therein with water for irrigation purposes, did he take any steps to have his land de-

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clared exempt from the operation of the law. It will be observed that the proviso in section 1 of the act exempting certain lands from its operation depends upon certain questions of fact, namely, that ditches, canals and reservoirs have been constructed before the passage of the act; that they have sufficient capacity to water the land thereunder for which the water taken in such ditches, canals and reservoirs is appropriated, provided further, except such district shall be formed to make purchase of such ditches, canals, reservoirs and franchises.

When the defendant in error signed the petition for the organization of this district he knew, as he admits, the actual facts concerning his land, the ditches and waters therefor, if any; yet regardless of these facts which he now states existed, he prayed that an irrigation district be organized to include them. This petition was an allegation, as well as an admission by him, that this land was such as could properly be included in such an irrigation district (not being formed to make purchase of any ditches or waters then owned by him) and also as the owner that he desired it included. Under the last proviso in section 2 of this act, had his land not been included in the proposed irrigation district, yet was susceptible of irrigation from the same source (a fact here admitted), upon application to the board, he probably would have been entitled to have had it included in the district. His signing the petition and thereby praying for the organization of a district to include the lands named then owned by him, was the same in substance as a statement therein by him that this land was such as could be, and a prayer that it be included in the district. The commissioners having acted favorably upon his request, their action is in the nature of a judgment and the facts as then represented by him upon which they acted are not thereafter open to attack by him. In this respect he is estopped from thereafter making claim to a different state of facts than his previous acts would imply.

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In Vol. 16, Cyclopedia of Law and Procedure, at page 796, it is said, "A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." At page 799, it is also said, "A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same, and the same questions are involved." At page 801, the author further states, "If in a particular transaction or course of dealing the authority, capacity, character, or status of one of the parties is recognized as one of the basic facts on which the transaction proceeds, both parties are as a rule estopped to deny that the one occupied that position or sustained that character." The above general rules are sustained by both reason and authority. We think they are applicable here. The authority of the board to include this land which rested upon a certain state of facts was not only recognized by the plaintiff, but with knowledge of all facts he assumed that it was such as would give the board jurisdiction over it; by his actions he took a position in harmony therewith, and by his signed petition prayed that the board act accordingly. Under these circumstances he ought not now be heard to say that the facts are different than what his former petition would imply, and for which reason that the board was without jurisdiction to do what he had previously prayed them to do.

Under one of the provisos in section 2 of the act, if omitted, he probably could have had his land included in the proposed district by presenting his individual petition to the board for that purpose, the land being susceptible of irrigation from the same source. If such a petition had been presented, and the board had included his land, under such circumstances could it be consistently urged (after the district had contracted a large indebtedness with which to supply water for all the

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lands, including that in question) that he could then be heard to say that the facts were different than what his former petition would imply, and for which reasons his lands were not a part of the district? We do not think so. We see no difference, in substance, between the signers of the two petitions. The first is to secure the organization of the district to cover the lands therein named of which the signers of the petition are the owners of a majority of the acreage. The second is to allow the signer to have his land included as a part of the proposed district, if he so desires, although not included in the original petition.

Section 2 provides that the original petition shall be signed by a majority of the resident freeholders who are qualified electors of the proposed district, who shall also own a majority of the whole number of acres belonging to the resident electors of the proposed district. Assuming, *arguendo*, that the name of the defendant in error was necessary to be counted to make a majority of the resident freeholders who are qualified electors, or was necessary to be counted as one of those owning a majority of the acreage of the proposed district, and that this land was necessary to be included for that purpose, under such circumstances it has repeatedly been held that the signer will not be allowed to thereafter dispute such questions of fact.—*Beaver Borough v. Davidson*, 9 Penn. Sup. Ct. 159; *Ferson's Appeal*, 96 Penn. St. 140; *Lake City v. Fulkerson*, 98 N. W. (Iowa) 376; *Bidwell v. City of Pittsburgh*, 85 Penn. St. 412; *Dewhurst v. City of Allegheny*, 95 Penn. St. 437; *Broad Street Church's Appeal*, 165 Penn. St. 475; *Matter of Cooper et al.*, 93 N. Y. 507; *Burlington v. Gilbert*, 31 Iowa, 356; 7. Am. & Eng. Ency. of Law, p. 20, Notes; *Pepper v. City of Philadelphia*, 114 Penn. St. 96; *McKnight v. City of Pittsburgh*, 91 Penn. St. 273.

We think that the reasons and rules announced in the above cases are applicable here, and that the facts and circumstances of this case justify the application of the principle of

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estoppel. This makes unnecessary any consideration of the other reasons urged for a reversal of the judgment.

For the reason stated the judgment is reversed and the cause remanded with instructions to dismiss the action at the costs of the plaintiff. *Reversed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 6465.]

## MONTEZUMA VALLEY IRRIGATION DISTRICT ET AL. v. JOHNSON.

**The case ruled by the opinion in *Montezuma Valley Irrigation District v. Longenbaugh ante.***

*Error to Montezuma District Court.*—Hon. CHARLES A. PIKE, Judge.

Mr. W. F. MOWRY, for plaintiffs in error.

Mr. CHARLES A. JOHNSON, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

This action involves the validity of certain irrigation district taxes upon certain lands included in an irrigation district organized under our former irrigation district act, approved April 12th, 1901.

Soon after the approval of this act, which contained an emergency clause, the defendant in error, in conjunction with many other landowners, signed and caused to be presented to the board of county commissioners of Montezuma county a petition praying for the organization of the Montezuma Valley Irrigation District. The boundaries of the pro-

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posed district as set forth in the petition, included eighty acres of land owned by the defendant in error. The county commissioners duly considered the petition, made certain findings of fact, and, following the procedure prescribed by the act, after the election therefor, declared the district as such duly organized under date of December 4th, 1901. Its boundaries as defined by the board included the above lands of the defendant in error. She paid irrigation district taxes thereon for two years. Prior to the institution of this suit the district had contracted a large bonded indebtedness for a water system.

The regluarity of the proceedings relative to the organization of the district and the issuance of the bonds (the evidence of this indebtedness) was duly confirmed by decree of the district court upon May 12th, 1906, as provided for by the act. No exception was taken to, or appeal from, this decree; no question is raised concerning the regularity of any of these proceedings.

Upon August 22nd, 1907, which was more than six years after the organization of the district and more than one year after the date of the decree of confirmation, the defendant in error instituted this suit to restrain the district board, the county treasurer, and the county assessor, from levying and collecting irrigation district taxes uopn these lands. She also prayed the court to decree that they are no part of the district. As grounds for this relief she alleges that prior to the organization of the district, and during all times since, there were ditches constructed of sufficient capacity to water these lands, and that waters from certain natural springs and seepage were and had been so appropriated by this plaintiff and her grantors to water the said lands, and they were at all times mentioned watered and irrigated from said natural springs and seepage by and through said ditches. She also alleges, and it is conceded, that the district was not organized or formed to purchase, acquire, lease or rent the plaintiff's alleged ditches or water rights acquired from said natural

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springs, seepage or otherwise, and that the district has never made purchase of any of them.

Numerous defenses were presented, including that of estoppel. The relief prayed for was granted. The defendants bring the case here for review upon error.

The pleadings as well as the facts necessary to consider are substantially the same as those in case No. 7197, The Montezuma Valley Irrigation District, et al v. George M. Longenbaugh decided at this term. For the reasons there stated the judgment is reversed and the cause remanded with instructions to dismiss the action at the cost of the plaintiff.

*Reversed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 7310.]

## FARMERS' RESERVOIR AND IRRIGATION COMPANY v. COOPER, ET AL.

1. WATER RIGHT—*Evidence*—The petitioner in proceedings in the Eminent Domain Act impliedly admits that those named as respondents are the owners of the land, and of all appurtenances thereof, including the right to enjoy the waters of a spring rising thereon, and seepage waters which accumulate there, all of which such respondents have for many years applied to beneficial uses.

2. EMINENT DOMAIN—*Damages to Land Not Taken*—In proceedings under the statute of eminent domain the jury should allow all damages, present and prospective, which are the natural and necessary or reasonable incident of the taking.

3. ——*Negligent or Wrongful Construction*—Anticipated damages, by reason of the negligent or unlawful construction of the improvement, by the petitioner, are not to be allowed. But where, before the hearing the petitioner had assumed possession, and constructed an irrigating canal across a gulch or ravine, by means of an embankment, without any opening, and had thus prevented the land owner from receiving the waters of a spring which rose above the

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embankment, and seepage waters which before that had, with the waters of the spring been wont to flow down the gulch, and had for years been applied by the land owner to beneficial uses, it was *held*, not a case of anticipated damages, but an actual, present injury, depreciating the value of the land not taken, and for which, though resulting from the manner in which the work was constructed was properly considered, in the estimate of damages.

4. ——*Incidental Damages*—Destruction of growing crops, injury by flooding, to an orchard, upon the land not taken, and to buildings situate thereon, additional fencing made necessary by reason of the improvement, and that portions of the land are made inaccessible and practically valueless, are proper matters of consideration, as bearing upon the difference in market value, before and after the taking, of the land not taken; but not as constituting separate elements of damage. No allowance should be made for these particular injuries, as such. They are to be considered solely as bearing upon the depreciation in value of the land not taken.

5. ——*Evidence—Rental Value*, of the land, within a time reasonably proximate to the time of the assessment, may be shown to aid in estimating the depreciation in value of the land not taken. The assessment being had in March, 1910, *held*, that the rate at which the land rated prior to 1908, was properly rejected, as too remote.

*Appeal from Jefferson District Court.*—HON. JOHN T. SHUMATE, Judge.

MR. W. A. DIER, *Messrs.* SMITH, BROCK and FERGUSON and Mr. W. W. PLATT, for Appellant.

MR. F. T. JOHNSON, for Appellees.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The Farmers' Reservoir and Irrigation Company instituted proceedings under the Eminent Domain Act to condemn a right of way for its canal across a quarter section of land owned by A. A. Cooper and occupied by Frank Merrick, as tenant, under a lease from Cooper, both of whom were made parties to the proceeding. The case was tried to a jury and a verdict brought in, fixing the value of the land actually taken at $747.50, and the damages to the residue at $6,229.00,

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and a judgment rendered accordingly. From this judgment the company has appealed. For convenience, we shall hereafter refer to the appellant as petitioner, and the appellees as respondents, that being their relation in the court below.

The quarter section is crossed by a depression, which runs diagonally across the center of the tract from the north to the south line, and is mentioned in the testimony as Spring Gulch.

When the proceedings were instituted, the petitioner was granted immediate possession of the land sought to be condemned. Under this order the canal was constructed and completed before the case was tried. On the land there was a natural spring, the flow from which was augmented by seepage water originating on the land, all of which flowed down Spring Gulch. The right of way crosses this gulch below the spring, and the point where the seepage water originated. Over and through this tract petitioner built what is referred to in the testimony as the Croke Canal. This canal was carried across Spring Gulch by a fill, without any opening. As we understand the record, a reservoir had been constructed by respondents and their grantors which was supplied with water from Spring Gulch. Other improvements on the land consisted of a house, barn, and outbuildings, and an orchard, all of which were located above the canal, and in the near vicinity of Spring Gulch. The right of way destroyed some of these improvements.

On behalf of respondents resulting damages, that is, damages to the land not taken for the right of way, were claimed, based upon the ground that the canal, as constructed, prevented the use of the water flowing in Spring Gulch, and cut off the water supply for the reservoir.

Witnesses for respondents were asked the following question: "Assuming that the spring of water, together with the seepage water, situated in the draw in and above and upon the right of way of this company is practically destroyed, taken and appropriated by this company; assuming

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that the reservoir now located on the land is practically made useless for the purpose it was used for and can be used, * * * What would be the actual diminution in the market value of this land?" We understand by "this land" is meant the remainder of the tract not actually taken for right of way. The answers varied from twelve hundred to twenty-five hundred dollars.

Counsel for petitioner contend that an objection to this question should have been sustained for three reasons: (1) That it was based upon an assumption contrary to the facts; (2) that even if the use of the water from Spring Gulch was prevented and destroyed by the construction of the canal, it was not a proper element to consider in estimating damages, for the reason that respondents showed no right to the use of such water; and (3) that, under the petition, the cutting off of the water was not a matter for which damages could be recovered in this action.

As previously stated, the cause was tried after the canal had been constructed, and we should here note that the jury viewed the premises.

The testimony on behalf of respondents tended to prove that the water flowing down Spring Gulch from the sources named was arrested in its flow, and accumulated behind the fill and overflowed into the canal, which prevented it from passing beyond the right of way occupied by the ditch. Below the canal was a reservoir on the land, which, previous to the construction of the canal, was supplied with from from the spring and the seepage in question; that the spring water was suitable for domestic use; that in connection with the seepage water, it was suitable for stock, and irrigation purposes, and that the water from these sources which accumulated in the reservoir was good for irrigation, stock, fish, and ice purposes; that it had been used for all these purposes by respondents, in connection with the quarter section involved; that the spring furnished the sole supply for domestic use; and that the fill, right of way, and accumulation of water be-

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hind the fill so covered up the waters from the spring, that it was rendered inaccessible and no longer fit for domestic use.

There may be some conflict in the testimony as to the extent the use of the water from Spring Gulch is interfered with by the construction of the canal; but this conflict was a matter for the jury to determine, and as they viewed the premises, and there is testimony to prove the facts upon what may be termed the hypothetical question propounded to witnesses for respondents was based, we are of the opinion that the contention by counsel for petitioner, that the question was based upon an assumption contrary to the facts, is not supported by the record.

In our opinion there is no merit in the contention that petitioner is not liable to respondents for the depreciation in the value of the land not taken resulting from destroying the use of water from Spring Gulch, upon the ground that they did not establish a right to its use. The petitioner commenced these proceedings, naming the respondents as the parties in whom the title to the land was vested, thereby admitting, in the absence of a special averment to the contrary, that they were the owners of the land, and everything upon it which might be regarded appurtenant. The water involved originated on this land. It had been applied by respondents and their grantors to beneficial uses upon the land for many years prior to the construction of the canal, through the reservoirs and ditches constructed by Cooper and his grantors. We think this is sufficient, in connection with the conceded ownership of the land, to make a *prima facie* case establishing in respondents the right to the use of water from Spring Gulch as an appurtenance to the land.

In condemnation proceedings, the owner across whose land a right of way is taken, is entitled to recover damages to the residue caused by such right of way, equal to the diminution in the market value of such residue for any use to which it may reasonably be put.—*Colo. Midland Ry. Co. v. Brown*, 15 Colo. 193. It is true the petitioner is not attempting to

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condemn the spring and seepage water for its own use, but by constructing its ditch in the place and manner it did, it has interfered with the use of water belonging to respondents upon their land as theretofore enjoyed by them. This necessarily depreciates its market value, and to this extent the petitioner should respond in damages, not for the value of water taken or appropriated, but because by the construction of its canal, it has depreciated the value of respondents' land by depriving them of the use of water thereon to which they are entitled.

In condemnation proceedings all damages, present and prospective, that are the natural, necessary or reasonable incident of taking the property sought to be condemned, must be assessed, but this does not include such as may be anticipated from negligent or unlawful construction of an improvement thereon by the petitioner.—*Denver City I. & W. Co. v. Middaugh,* 12 Colo. 434. Based upon this proposition, counsel for petitioner contend that respondents are not entitled to recover damages resulting to the residue of the land occasioned by being deprived of the use of the spring and seepage water, for the reason that if damages are thus caused, they are the result of the unskillful construction of the canal across the gulch down which these waters naturally flow. This conclusion is not tenable. Petitioner constructed its canal across the gulch by means of a fill. By so constructing it, respondents have been deprived of the use of spring and seepage water, which is the natural result of constructing the canal in the manner the petitioner did, by means of which damages have been occasioned at the very time they were assessed; hence, respondents are not claiming anticipated damages for negligent or unskillful construction, but damages which directly result from the taking of the land and the construction of the canal, which had been suffered at the time the case was on trial, as an incident to the taking of the right of way, and the construction of the canal thereover, and which will continue in the future. In such circumstances, depriving respondents of the water to which they are entitled is in no sense an inde-

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pendent tort which should be the subject of an independent action.

On the land were located a house, out-houses and a barn; also, an orchard, consisting of about fifty trees, and some growing crops. Some of these improvements were on the right of way and destroyed. Others, it was claimed, by reason of the near proximity of the canal, were rendered useless. The orchard in part was flooded by the water collecting back of the fill. The crops growing on the right of way were injured or destroyed. Testimony regarding the value of these improvements, crops and orchard was introduced by respondents, and the extent the market value of the residue was injured by reason of the destruction or injury of these items. A general question was propounded to witnesses for respondents, the object of which was to elicit an answer as to what the effect on the market value of the residue of the land would be, assuming that these items were injured or destroyed. Counsel for petitioner insist that from this question, which the witnesses were permitted to answer, the jury were allowed to infer that in estimating the damages to the land not taken, they were authorized to consider the value of such land, plus the value of crops destroyed, the value of buildings injured or destroyed, as well as the value of other items included in the question. In condemnation proceedings, double damages are not allowable, so that in estimating damages to the land not taken for a right of way, the value of improvements injured and destroyed are not to be considered, standing alone; but, in estimating damages to the residue a wide range of evidence is admissible. If an improvement is injured or destroyed by a right of way, necessarily the market value of the residue is depreciated; for in estimating the value of lands, the improvements thereon cut more or less of a figure. For this reason, the value of the improvements injured or destroyed by the right of way are proper to consider, not as constituting separate elements of damage, but in estimating the depreciation of the value of the land not taken. We think this was the pur-

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pose and purport of the question, and was so understood and treated by the jury, as the court, in instructing them, stated, in effect, that in estimating the damages, if any, to the residue of respondents' land, they were not authorized to assess damages for each specific element or item of alleged damage, which may have been shown by the evidence, but that their consideration of these elements of damage could only be considered by them in so far as they found, from the evidence and from their view of the premises, that the fair cash market value of the residue of the land was thereby depreciated by the construction of petitioner's canal, and that none of these elements of damages could be considered as independent of, and additional to, the depreciation of the value of the residue, and concluded the instruction by stating: "The question is, after considering all proper elements of damages, as limited by these instructions, and rejecting all remote and speculative elements of damages; how much is the fair, cash market value of the residue of said lands, not taken, decreased or diminished in value by reason of the construction and operation of said canal?" In this connection, it is not amiss here to note, that this instruction carefully guarded the rights of the petitioner with respect to the value of the right to the use of the water which the respondents claimed was rendered useless by reason of the construction of the canal.

Counsel for petitioner also contend that from the evidence admitted and the instructions given, the jury were authorized to assess, as damages, the expense of additional fencing. This contention is not supported by the record. To the extent the taking of the right of way impaired the value of the residue, respondents were entitled to be compensated. If the future use of the residue required additional fencing, and this fact would render it less valuable than it would otherwise have been, then this was proper to consider in estimating damages to the residue, not, however, as a separate element equal to the cost of increased fencing, but the amount of depreciation in the value of the residue caused by the increased

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burden upon its use.—*Newgass v. Railway Co.*, 54 Ark. 140. This was the purport of the instructions of the court bearing on the subject.

At the trial counsel for petitioner, on the cross-examination of a witness for respondents, elicited the fact that the quarter section had been rented for the years 1908 and 1909 for between three and four hundred dollars per annum. They afterwards introduced testimony tending to prove that for the years 1902 or 1903 to 1907, inclusive, the place had rented for one hundred and fifty to two hundred dollars per annum. On motion of respondents the testimony relating to the rent received prior to 1908 was stricken, upon the ground that it was too remote. Where a tract of land is injured by taking a portion of it in the exercise of the power of eminent domain, it is proper in determining the damages to consider the income derived from it. Testimony on this subject, however, ought to be limited to a period reasonably proximate to the time the damages are being assessed, as such testimony tends better to establish a rental value than what such value may have been several years prior. We think the court did not err in striking the testimony under consideration.

Numerous errors are assigned upon the admission of testimony by respondents, the purpose of which was to show injury to the residue of their land, as the result of the construction of the canal. We do not believe it is necessary to consider the various questions thus raised in detail, as we think the testimony challenged was competent as tending to prove what might reasonably and naturally be anticipated would occur in the future which would affect the market value of the residue.

It is finally urged that the verdict is excessive. The jury viewed the premises. There is ample testimony to support their verdict. It does not appear that incompetent testimony was admitted. It appears that the canal enters the quarter section near the southeast corner, and after a meandering

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course of about three-quarters of a mile, leaves the premises near the northwest corner, thereby cutting into and through three of the four forty-acre tracts constituting the land involved; that the amount of land actually taken for the right of way is about eight acres, but on account of the course of the canal, the manner of its construction, and its future method of operation, about six acres outside of the right of way are practically made valueless. The jury were carefully instructed what matters they should consider in estimating damages. In such circumstances it is not within the province of this court to say from a review of the testimony that the jury erred in rendering the verdict they did.

The judgment of the district court is affirmed.

*Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

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[No. 7536.]

## McGOVERN v. CITY AND COUNTY OF DENVER.

1. PUBLIC OFFICER—*Fees*—Where fees are the only compensation allowed by law to a public officer for the discharge of his official duties, he is not entitled to compensation for the discharge of duties for which no fee is prescribed. The performance of such duties without compensation is a burden which the officer assumes when he accepts the place.

2. CORONER—*No Fee Allowed for Mere Investigations*—Under Rev. Stat., sec. 2577, the coroner is not allowed compensation for the investigation of cases of violent or sudden death, when he holds no inquest; and section 1219 of the Revised Statutes does not have the effect of allowing such compensation.

3. STATUTES—*Construed*—A statute allowed the coroner a specified fee for each day employed in holding an inquest. Another statute prescribed the manner in which accounts against the county should

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be made, requiring that each item should be separately stated, and adding "and where no specific fees are allowed by law the time actually and necessarily devoted to the performance of any service charged in such account shall be specified." *Held*, that the latter statute has not the effect to entitle the coroner to compensation for the investigation of violent or sudden deaths, where no inquest was held.

*Error to Denver District Court.*—Hon. CARLTON M. BLISS, Judge.

Mr. PAUL J. McGOVERN, Mr. GEORGE F. DUNKLEE and Mr. OSCAR E. JACKSON, for plaintiff in error.

Messrs. SMITH & BROCK, for defendant in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The complaint alleges, among other things, that plaintiff was at all times mentioned therein the regularly elected, qualified and acting coroner of the city and county of Denver; that as such officer it was his duty, upon being informed of the violent or sudden death of a person within his jurisdiction, the cause of which was unknown, to immediately view the body and make investigation respecting the cause and manner of the death, and if satisfied that death was not procured by another person, or by unlawful means, no suspicious circumstances appearing, to deliver the body to the friends or relatives of the deceased for interment; that from February 3rd, 1909, to January 5th, 1911, as such officer, he was informed of the violent or sudden deaths of five hundred and seven persons, and made separate investigation and inquiry in each case, in compliance with the statute; that he necessarily spent one day in each case, which service was reasonably worth $5.00 a day, aggregating a total of $2,535.00, and prays judgment for that amount. The parties stipulated that monthly accounts of such services were regularly itemized, presented to, and disallowed by the defendant, and also finally presented to it for the total amount above specified and disallowed on January 1, 1911. A general demurrer was inter-

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posed to the complaint and sustained. The plaintiff elected to stand by his cause as made; the court thereupon dismissed the action, at the cost of plaintiff, who brings the case here on error to review that judgment.

The statute relative to compensation of county coroners, Section 2577, Revised Statutes of Colorado, 1908, reads as follows:

"In counties of every class the coroner shall be allowed the sum of five dollars per day, for each day actually employed in making an inquest and ten cents per mile for each mile actually and necessarily traveled in going to and returning from the place of inquest, to be paid out of the county treasury. For all services performed in the place of sheriff, the coroner shall receive the same fees as are allowed to the sheriff for like services."

The compensation claimed in this suit is not for services rendered in conducting inquests, but for investigating cases of violent or sudden death in which the coroner deemed no inquest necessary. It is plain that the fee fixed by statute, which is the only compensation provided for county coroners, is purely for services rendered when an inquest is actually held. The sole question, therefore, is whether a county coroner may recover from the county compensation for official service other than as provided by statute. It has been determined in this state that a county clerk, judge or treasurer may not recover additional compensation under like circumstances, and there is no reason why any other county officer, whose compensation is fixed in fees, should be permitted to do so. *Garfield County v. Leonard*, 26 Colo. 145; *Garfield County v. Beardsley*, 18 Colo. App. 55; and *Mitchell v. Wheeler*, 20 Colo. 159.

In the case of *Garfield County v. Leonard, supra*, speaking of a like proposition to that presented here, the court said:

"The remaining items in this account consist of claims for services performed, which are public in their character, like

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giving election notices, canvassing vote, recording abstract of official vote, issuing certificates of election, preparing tax list of county and state taxes and other services of a similar nature. The performance of these duties devolved upon appellee in his capacity as county clerk. The statute does not provide that for services rendered for which no special fee or other remuneration is provided, the county clerk shall be paid a reasonable compensation; no implied assumpsit existed between appellee and the county for services rendered by him in the capacity of clerk for which no fees were specially fixed by law. —*Locke v. City of Central,* 4 Colo. 65. * * * Upon what theory, then, can it be maintained, that when he performs official duties imposed by law for which no compensation is provided, he shall be paid therefor by the county, in the absence of any provision to that effect? The performance of duties enjoined by law is not of itself the rendition of services at its instance, and to hold that the county must pay therefor, would create a liability against it which has no existence, either expressly or by implication, and result in injecting into the law, a provision entirely foreign to its letter and spirit. * * * When appellee assumed the duties of his office, he did so subject to its burdens.—*Turpin v. Board of Commissioners,* 7 Ind. 172. His compensation for official acts being regulated by statute, he is only entitled to charge for those services to which compensation by law attaches (*Debolt v. Trustees, Cincinnati Twp.,* 7 Ohio St. 237), for the rule is inflexible, that an official can demand only such fees or compensation as the law has fixed and authorized for the performance of his official duties (*Town of Carlyle v. Sharp,* 51 Ill. 71; *Board of Commissioners v. Barnes,* 123 Ind. 403), and the statute having imposed upon appellee the duty of performing services which he incidentally rendered in the discharge of his general official duties for the performance of which no compensation is provided, cannot require the county to pay therefor. His remuneration for such services was had in the compensation received for those to which it specially attached, and

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which the legislature intended as an equivalent for the duties he was required to perform, for which none was provided.—*Cole v. White,* 32 Ark. 45."

Where certain fees are prescribed for an official, as compensation, it is fundamental that he is not entitled to demand and receive any other, different or additional pay. Where the only compensation provided for a public officer for the discharge of his official duties consists of fees, and certain duties are imposed upon him by law, for which no compensation is provided, he cannot recover for services in the performance of such duties on the basis of a *quantum meruit,* or at all, the conclusive presumption being that compensation for such services is covered by the allowance made for the performance of other official acts for which fees are prescribed. The performance of certain duties, without compensation in a feed office, is a burden attaching practically to all such official positions, and this burden is voluntarily assumed by an officer when he accepts the place, as he is presumed to know the requirements of the law. *Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

*On Petition for Rehearing.*

On application for rehearing, it is contended, under section 1219, Revised Statutes of 1908, which is in part as follows:

"No account shall be allowed by the board of county commissioners, unless the same shall be made out in separate items, and the nature of each item stated, and where no specific fees are allowed by law the time actually and necessarily devoted to the performance of any service charged in such account shall be specified; which account so made out shall be verified by affidavit;" etc., that the coroner is entitled to compensation for the services in question according to their reasonable worth. This section does not provide or undertake to provide for compensation. It simply directs how bills for services,

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for which compensation is due, but for which no specific fee is fixed, shall be made out. That is, applying the statute to the slaim in suit, if there were a law to the effect that in addition to the regular fees fixed by statute, the coroner, for the services in question, should receive reasonable compensation, to be allowed by the board of county commissioners and paid out of the county treasury, he would have a claim for submission under this section. Since, however, there is no statute allowing compensation for such services, the coroner has no claim on this account, and it was properly disallowed.

If the decision in 3 Colorado Appeals 576, *Board of County Commissioners v. Leonard,* is in any particular in conflict with the foregoing views, it was to that extent overruled in *Garfield County v. Leonard, supra,* which states a rule in harmony with that here announced.

Petition for rehearing denied.

Decided March, A. D. 1913. Rehearing denied April 7, A. D. 1913.

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[No. 7574.]

## LEMASTER V. THE PEOPLE.

1. CRIMINAL LAW—*Embezzlement of Corporate Funds—Consent of Officers*—Where the officers of a corporation fraudulently consent to the appropriation of its funds by one of their number, on pretense of satisfying a factitious and groundless claim which he asserts against the corporation such consent is no defense to the charge of embezzlement.

2. ——*Evidence—Depositions*—In order to enable certain non-resident witnesses for the people to return to their homes their depositions are taken, under the statute (Rev. Stat., Secs. 7277-7279), by consent and in the presence of the accused. It is not error to receive such depositions, in behalf of the people though no affirmative proof is given that the personal attendance of the witnesses might not be procured.

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3. ——*Letters of Corporation Admissible Against the Managing Officer*—Information against the managing officer of a corporation for embezzling the corporate funds. Letters purporting to come from the corporation, and shown to have been received, in due course of mail, by the witnesses producing them, and which relate to transactions had between the corporation and those so producing them, at a time when the accused was controlling the affairs of the corporation and which tend to show the source of the funds in question, are admissible, without evidence identifying the handwriting of such letters.

4. ——*Copies of Letters*—In the same case copies of letters written or dictated by the accused, in reply to those received from the corporation, were held admissible against him, the originals not being produced nor accessible.

5. ——*Copies of Letters of the Corporation*, found in its impression book, written at defendant's dictation, and mailed to persons in other states, were held admissible against him, without any showing to excuse the non-production of the originals. The book was regarded as, in effect, containing the letters of the accused, and the letters a declaration against interest.

6. ——*Annual Report of the Corporation*, filed in the secretary's office and certified therefrom, and tending to show criminal intent, held admissible for the people.

7. ——*Account Books of the Corporation*—Information against the managing officer of a corporation for the embezzlement of its funds. The defense being that the moneys in question had been properly applied by the accused to discharge salary due him, the account books of the company were held admissible to show what had in fact been paid him on account of salary.

The evidence held sufficient to identify the books produced, as those of the corporation.

8. ——*Expert's Examination of Account Books*—Voluminous books of Account of such character as to render it difficult for a jury to arrive at correct conclusions therefrom, may be explained by an expert accountant, and the true state thereof shown by his testimony —the books being produced in court.

9. ——*Relevancy*—The corporation, the embezzlement of whose funds was charged against the prisoner was in effect the accused himself. *Held*, that its insolvency might be shown as bearing upon the intent of the accused.

10. Witness—*Competency*—One K, while in the employ of the corporation whose moneys the prisoner was alleged to have embezzled had been giving information to the attorneys of certain parties with whom the company was dealing. Being discharged he was at once

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taken into the care of, and supported by, one of these parties, a creditor of the company, and the same by whom the present accusation was instigated and prosecuted. The same witness had made oath to the information against the prisoner. *Held*, that he was nevertheless a competent witness for the people.

11. WRIT OF ERROR—*Harmless Error*—The admission of evidence cures any error in its previous exclusion.

The admission of evidence having no bearing upon the matter in issue is harmless.

12. EVIDENCE—*Cross-Examination*—The extent to which cross-examination may be carried is largely in the discretion of the trial court. One who had been a prisoner in the county jail at the same time with the accused, testified to conversations had with him during such imprisonment. This witness had been in jail on several occasions. *Held*, not an abuse of discretion to exclude a question propounded on cross-examination, as to the charge upon which he had first been arrested.

13. INSTRUCTIONS—*To Be Construed As a Whole*—Where the law of the case is clearly and explicity set forth in one point of the charge the effect of equivocal language elsewhere therein is eliminated.

*Error to Denver District Court.*—Hon. GREELEY W. WHITFORD, Judge.

Mr. THOMAS M. MORROW, for plaintiff in error.

Hon. BENJAMIN GRIFFITH, attorney general, and Mr. GEORGE D. TALBOT, special counsel, for the people.

Mr. JUSTICE HILL delivered the opinion of the court:

The plaintiff in error was convicted of embezzling $3,700 from The D. F. LeMaster Brokerage Company, a corporation; he brings the case here for review upon error.

It is earnestly urged that the evidence is insufficient to sustain the verdict. The defendant contends, that, while he appropriated the money, he was guilty of no crime, for the reason that he was entitled to it, as and for salary for services previously rendered to the corporation, and that he had the consent of the company to so apply the money. The people claim: first, that the defendant had been paid his salary in full and that the claim of $3,700 for back salary was a trumped-up

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claim; second, that if the company was indebted to him for salary, it being insolvent to his knowledge, and owing various parties large amounts for flour which it had but recently purchased on credit and sold for cash, it was fraudulent for him to thus convert the money so due them to his own use, and that even assuming he was a creditor that because he was also a director, an officer and its manager, his duty was to hold this money in trust for all the creditors; that upon account of these facts and the circumstances under which he appropriated it, he was guilty of embezzlement. It is unnecessary, in an opinion, to analyze or set forth in detail the evidence pertaining to the transaction. It is sufficient to state that we have given it careful consideration and are of the opinion that there is sufficient evidence to justify the verdict.

Prior to the trial, depositions of witnesses residing in Kansas were taken, in the presence of the accused, pursuant to a waiver of notice by him. These were taken under the provisions of General Sections 7277-7279, Revised Statutes, 1908. When the district attorney offered to read these depositions to the jury, counsel for the defendant objected, claiming that no proper foundation was laid; that there was no showing that the witnesses could not be produced. The objection was overruled. We find no error in this respect. Section 7278, *supra,* provides, "that such deposition shall not be used if, in the opinion of the court, the personal attendance of the witness might be procured by the prosecution, or is procured by the accused." It stands admitted that these witnesses were residents of Kansas, their depositions were taken in order that they might return to that state. By the ruling it was evidently the opinion of the court that the personal attendance of the witnesses might not be procured by the prosecution, there was no offer by the defense to produce them. The statute says "if, in the opinion of the trial court," etc.; we find no abuse of the discretion exercised.

Complaint is made to the admission in evidence of certain letters purporting to have come from The D. F. LeMaster

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Brokerage Company. It is claimed there was no attempt to identify the signature as the handwriting of D. F. LeMaster. They were received in the regular course of mail; their contents were in connection with a general line of transactions between the corporation (of which the plaintiff in error was the controlling factor) and the sundry witnesses, and were introduced principally for the purpose of disclosing the transactions which led up to and disclosed from what source the corporation received the money which the jury found was thereafter embezzled by the defendant. We do not understand that it requires the testimony of an expert in handwriting to make admissible letters of this character. We think they were sufficiently identified for the purposes offered.

Complaint is made to the admission in evidence of carbon copies of letters written by witnesses in reply to those received from the defendant's company, either written or dictated by him. Upon his objections to the copies the defendant was requested to produce the originals; he stated his inability to do so and from his counsel's statements it appears that the allowance of time after the request was made would have been of no assistance in this respect. The witnesses testified that the carbon copies were made at the same time and that the originals were properly mailed, etc. Under these circumstances we think the copies were properly admitted.

A Mr. Grandt testified that he had been employed by The D. F. LeMaster Brokerage Company. An impression copy book was placed in his hands which he identified as belonging to the company, and he referred to copies of various letters therein, stating that the originals of which the impressions in the book were copies had been written and mailed to various persons and companies; that he wrote the greater majority of the letters at the dictation of the defendant. The pages in this book thus referred to by the witness were offered in evidence. It is claimed that this was prejudicial error, as no effort was shown to have been made to obtain the originals. We do not think so. The object of this testimony was to show the crimi-

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nal intent of the defendant. The letters were shown to have been mailed to sundry people and companies in other states, who were beyond the jurisdiction of the court. The book contained impression copies taken at the time; we think this sufficient without further showing to justify their admission. This was in substance the defendant's impression book of his own letters. It contained declarations against interest and for this purpose was properly admitted.—*D. & R. G. R. R. Co. v. Wilson,* 4 Colo. App. 355.

A certified copy of the annual report of The D. F. LeMaster Brokerage Company, filed in the office of the secretary of state, March 2nd, 1910, was offered in evidence over the objection of the defendant. We find no objection to this evidence. It likewise went to show the criminal intent of the defendant; if otherwise, it was harmless error.

The books of The D. F. LeMaster Brokerage Company were properly admitted in evidence, as well as the defendant's salary account therein, showing what he had been paid, etc. All had a bearing upon his contention that he had, in good faith, appropriated this $3,700 to his own use upon account of salary. This line of testimony was especially applicable when it is considered that this was practically a one man corporation. It is claimed that the books of the company were not properly identified. J. F. Spencer testified, that he was the trustee in bankruptcy of The D. F. LeMaster Brokerage Company; that as such trustee he had the books of that company and that he recognized the books in court before him as the books of the company. A Mr. Grandt testified that he had been employed by the company; that the defendant was in charge of its affairs and that he recognized the books in court as the books which he saw while employed by the company. We think the books were sufficiently identified.

Many exceptions were taken to the evidence of E. D. Kellogg; he had been in the employ of The D. F. LeMaster Brokerage Company just prior to the time it went into bankruptcy. It is claimed, that while thus employed he was en-

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gaged in giving alleged information to the attorneys for certain Kansas millers from whom this company purchased flour; that just before it went into bankruptcy Kellogg was discharged; that he was immediately taken to Kansas, and there supported and maintained by The Phillipsburg Milling and Elevating Company; that this concern was responsible for the defendant's prosecution, and that this witness swore to the original information in this case. Unquestionably Mr. Kellogg's testimony was very damaging to the defendant in disclosing his criminal intent, but whether or not his evidence was manufactured, as claimed, was for the jury to determine. The facts above named, if true, did not make him incompetent to testify.

It is claimed that the court erred in refusing to admit in evidence page 13 of the minute book of the corporation when John Bernard, a witness called by the defendant, identified the page and book. Thereafter, the defendant took the stand and this identical evidence was admitted during his examination. This eliminates any question of prejudicial error concerning its original rejection.

One James W. Bennett, who had been incarcerated in the county jail several times prior to the trial, testified to an alleged conversation between himself and the defendant, while both were in jail. Counsel claims an inspection of his evidence will show that the alleged conversation had no bearing whatever on the issue of the case. If that is true, we fail to appreciate wherein any prejudicial error was committed. It would be harmless error at least. Upon cross-examination the court declined to compel the witness Bennett to answer what the first charge was on which he had been incarcerated. The evidence disclosed that the witness was then in jail and had been for some time. He was not asked if he had ever been convicted of a crime. If he had not been, but was awaiting trial, we think the general rule concerning impeaching testimony was applicable to him the same as any other witness.—*Tollifson et al. v. People,* 49 Colo. 219. The witness' history, pertaining

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to his sojourn in the county jail, was gone into quite fully. The jury had this before them with which to determine the weight to be given his testimony. The extent to which counsel may go upon cross-examination in such matters is largely within the discretion of the trial court. We cannot say that the court abused its discretion in the respect referred to.

E. F. Arthur, an expert accountant, was permitted to testify that he had made an examination of the books of The D. F. LeMaster Brokerage Company and as to certain facts which they disclosed, one of which was that the company was insolvent at the time of the alleged embezzlement. It is claimed this was prejudicial error. The books were in court subjct to inspection; they were quite voluminous and of such a character to render it difficult for the jury to arrive at a correct conclusion concerning their exact condition. Under such circumstances resort may be had to the aid of an expert bookkeeper to examine and explain the true state of their condition, etc.—*Brown v. First National Bank,* 49 Colo. 393. It is further urged, that it was prejudicial error to thus show the insolvency of the corporation; that as the charge was for embezzlement it was immaterial whether the corporation was solvent or insolvent. This last statement is unquestionably true, but, when we conisder that this was in fact what is commonly termed a one man corporation, and that man was the defendant, its solvency would have a bearing upon the question of his criminal intent, when it is shown, and in fact admitted, that he at this one time took $3,700 of its funds and appropriated it to his own use, under the alleged claim of back salary then owing him by his corporation.

About one hundred twenty assignments of error have been made pertaining to the admission and rejection of testimony. We have answered in detail what appears to us to be the most important. It would unnecessarily lengthen this opinion to thus answer all; we have considered them but find no prejudicial error in this respect.

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Numerous assignments are made pertaining to instructions given, refused and modified. They all center around the correctness of Instruction No. 10, which, in substance, advised the jury that while it is essential to constitute the crime of embezzlement that it be proved beyond a reasonable doubt that the moneys were taken and converted without the consent of the corporation, nevertheless, that the officers and directors could not legally consent to a fraudulent transaction, and that when, knowing the insolvency of the corporation, etc., they fraudulently consented to such a transaction, that such consent was illegal and the appropriation would still constitute the crime of embezzlement.

The rule, that it is no defense to a charge of embezzlement of the funds of a corporation to show that the moneys were taken by its consent where the officers and stockholders fraudulently consented thereto, in reason is supported by an overwhelming weight of authority.—*Reeves v. State,* 11 So. (Ala.) 158; *United States v. Harper,* 33 Fed. 471; *State v. Kortgaard,* 64 N. W. (Minn.) 51; *Taylor v. Commonwealth,* 75 S. W. (Ky. App.) 244; *McKnight v. United States,* 115 Fed. 972; *State v. Browning,* 82 Pac. (Or.) 955; *Secor v. State,* 95 N. W. (Wis.) 942; *State v. Foust,* 19 S. E. (N. Car.) 275; *State v. Nicholls,* 23 So. (La.) 980; *People v. Butts,* 87 N. W. (Mich.) 224; *Saranac & L. P. R. R. Co. v. Arnold,* 167 N. Y. 368; *People v. Ward,* 66 Pac. (Calif.) 372; *Holmes et al. v. Willard,* 125 N. Y. 75.

It is further claimed that this instruction is erroneous because it tells the jury that if the corporation was insolvent it would be unlawful for it to pay the defendant's claim and thereby make him a preferred creditor, because it says that the stockholders and directors cannot consent to an unlawful act on the part of the corporation; that from this language if the payment was unlawful, although made in good faith, the defendant had to be found guilty. We do not so understand the instruction, but to the contrary it says that the jury must further believe from the evidence, etc., that this was done while

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the company was insolvent and with the intention that the money was to be fraudulently converted from the corporation and fraudulently diverted from the payment of the creditors of the corporation, etc. As we read them in the manner there used, the words "fraudulently converted" and "fraudulently diverted" apply to criminal acts which include the intent, and not to where it was done in good faith, yet was in fact unlawful. In addition it is elementary that instructions must be considered as a whole. By Instruction No. 9 the jury were told that it would be a complete defense if the moneys were taken by the defendant on a claim for back salary, if this was done in good faith and without any intention on his part to defraud the corporation or its creditors, etc.; yet if the claim for back salary was not made in good faith, but if it were a mere pretense, or show, or device on his part to obtain the money and convert it to his own use, and to give the transaction the appearance of legality it was put upon the ground of a claim for back salary, that it would not constitute a defense. By Instruction No. 11 the jury were told, in substance, that in order to convict they must find that the company was under the control and management of the defendant; that it was insolvent; that this condition was known to the defendant; that he had this money in his possession by virtue of his employment and with this knowledge of the company's condition that he applied and converted the money to his own use under a claim or pretense that the same was due him for back salary, which had not been paid, and that this claim for back salary was not as a matter of fact a *bona fide* claim, and was not made in good faith, but was a mere pretense on the part of the defendant to convert the money to his own use instead of letting the corporation apply the money to the payment of all its debts.

When Instructions Nos. 9 and 11 are considered in connection with No. 10 complained of, we are of opinion that they eliminate any possibility of conviction in case the money was taken under a claim for back salary made in good faith, and also any question concerning the consent of the board of direc-

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tors to the application of these funds in payment of back salary, if given in good faith, regardless of whether it was intended to give a preference to the defendant or otherwise. This makes unnecessary any consideration of the question of the validity of the acts of the officers of an insolvent corporation, where in good faith, they attempt to make a preference in favor of one creditor.

Perceiving no prejudicial error the judgment is affirmed.

*Affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

Decided March 3, A. D. 1913. Rehearing denied April 7, A. D. 1913.

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[No. 7804.]

## STEINHAUER ET ALS. v. HENSON.

1. SALE—*Option to Return—Effect*—Where goods are purchased with an option to return them, the title passes, subject to the right to rescind and return.

2. ——*Option to Purchase*—In the case of a mere option to purchase the title remains in the one granting such option: the delivery of the goods to the one receiving the option is a mere bailment. If the bailee fails to exercise his option within a reasonable time, where no time is specified, the bailor may recall the goods.

3. ——*Duty of Seller*—One who has granted to another an option to purchase an article, no time being appointed for its return, or for the exercise of the option, shortly thereafter closes his place of business, goes abroad, and so remains till after the death of the optionee. He is not to be heard to complain of the failure of the optionee to return the article, nor will the option be converted into a purchase by such failure.

Whether the optionee was under duty to take affirmative action, and return the goods, *Quere.*

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4. CONTRACTS—*Construed*—A memorandum was signed by both parties as follows: "Pictures left with Mr. Smith on approval." Then followed the names and description of certain pictures. Opposite to each was set down the price, the whole amounting to.....$1,900

Under this was the following: "Credit by old frame..... 10

"$1,890"

"The above paintings may be exchanged at any time for face value "(that is, the price paid plus the increased market value)." *Held*, not a sale but a mere option to purchase.

*Error to Denver District Court.*—Hon. HUBERT L. SHATTUCK, Judge.

Mr. JOHN A. EWING, for plaintiffs in error.

Mr. JAMES J. BANKS, Mr. FRANCIS J. KNAUSS, Mr. H. E. LUTHE and Mr. C. R. BELL, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

Henson was engaged in selling paintings in Denver and made his headquarters at a certain studio where his pictures were on exhibition. About January 14, 1910, Smith and his wife visited the studio. After the visit and on the same day, or the next, three paintings were taken by Henson to Smith's residence, where they were at the time of Smith's death, which occurred on May 9th following. After the latter part of January, Henson did not make the studio his headquarters, but what pictures he had were taken to his residence. Early in February, Henson, leaving his residence in charge of a servant, went to Europe where he remained until July. After his return, he filed a claim against Smith's estate for the paintings left at Smith's residence. The county court disallowed the claim. On appeal, the district court, after a trial to the court, allowed the claim against the estate. Aside from the above facts, the only material evidence introduced by Henson was the following memorandum:

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"Denver, Colo., Jan. 25, 1910.

Pictures left with Mr. Smith on approval:—

| | |
|---|---|
| 1 water color by "Gabrini" (Music Master)..... | $1,200.00 |
| 1 water color by "ter Burgh" (Dutch Mill)..... | 250.00 |
| 1 oil by "de Mester" (Shore Scene)..... | 450.00 |
| | $1,900.00 |
| Cr. by old frame..... | 10.00 |
| | $1,890.00 |

The above paintings may be exchanged at any time for face value (that is the price paid plus the increased market value.)

J. E. HENSON,
American Agent,
L'Ouvre,
FRANK L. SMITH."

It was admitted that the signatures were those of Henson and Smith. Henson contends that this memorandum is evidence of a sale to Smith with the option of returning the paintings if the latter did not like them. The administrators contend that the memorandum shows that Smith did not buy the pictures, but that they were left with him with the option to purchase them if he liked them. If the parties understood that a sale had been made they certainly would have used words to express that understanding. The idea of a sale is a simple one and could have been simply expressed by the use of the words "sold to" instead of "left with," if the parties so understood it. "Pictures sold to Mr. Smith on approval" would be easily understood to mean that Smith bought the pictures with the option of returning them if he did not like them. "Pictures left with Mr. Smith on approval" would be a simple way to express the idea that the pictures were left with Smith with the option to purchase them if he liked them. The rest of the memorandum would then mean that if Smith bought them he was to have them at the prices named, receive credit

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for an old frame and have the privilege of exchanging the pictures at any time for face value as expressed. Smith did not agree to return them at any particular time. Of course if he did not choose to exercise his option to take the pictures in a reasonable time, Henson could have recalled the option and retaken them. We do not say that Smith would have been called upon to move within a reasonable time, but if he had been, he had no opportunity to do so, for Henson went away in a few days after the date of the memorandum, and remained away until after Smith's death. An option to return a purchase, if one does not approve, is different from an option to purchase, if one does approve. In the former case, the title passes, subject to the right to rescind and return; in the latter, the title does not pass until the option to buy is determined. The former is a sale and delivery, the latter a bailment which may be converted into a sale, at the option of the bailee.—*Hunt v. Wyman,* 100 Mass. 198.

The transaction between Henson and Smith was a bailment with the option to purchase, and as the option was never determined no sale took place. It follows that the judgment of the district court was wrong and is reversed and the cause remanded. *Reversed and Remanded.*

Mr. JUSTICE GABBERT and Mr. JUSTICE HILL concur.

Decided March 3, A. D. 1913. Rehearing denied April 7, A. D. 1913.

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[No. 8026.]

## IN RE SENATE RESOLUTION NO. 9.

1. CONSTITUTIONAL LAW—*Increase in Judicial Districts—Change of Boundaries*—The increase, diminution, or change of boundaries in the judicial districts, or in the number of judges in any district, referred to in section 14, of art. VI of the constitution is such as is brought about by the formation of a new district or the abolition of

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an existing one. The section has no relation to legislation changing a county from one district to another, so as not to abolish any district.

2. ——*Change of County from One District to Another—Effect*—Where a county is changed from one district to another, the judge of the latter district will thereafter preside in the district court of such county; neither of the judges of the district from which the county is taken is thereby removed from office.

Mr. FRED FARRAR, attorney general, and Mr. FRANCIS E. BOUCK, debuty atttorney general, appeared in support, by the senate's request.

There has been submitted to this court, by the honorable senate of the nineteenth general assembly now in session, the following resolution:

"*Senate Resolution No. 9. By Senator Cornforth.*

WHEREAS, There is now under consideration by the senate of the nineteenth general assembly of the state of Colorado Senate Bill No. 19 by Senator Van Tilborg, entitled:

"A BILL FOR AN ACT TO DETACH THE COUNTY OF TELLER FROM THE FOURTH JUDICIAL DISTRICT OF THE STATE OF COLORADO, AND TO ATTACH THE SAID COUNTY OF TELLER TO THE ELEVENTH JUDICIAL DISTRICT OF THE STATE OF COLORADO FOR JUDICIAL PURPOSES: AND TO REPEAL ALL ACTS AND PARTS OF ACTS INCONSISTENT WITH THIS ACT."

AND WHEREAS, said bill has passed on second reading by said senate on the 17th day of March, 1913, receiving eighteen votes in favor thereof, and said bill is now pending for third reading before the senate of the nineteenth general assembly.

AND WHEREAS, it is believed that a two-thirds vote is necessary to pass this bill in conformity with section 14 of article VI of the constitution of the state of Colorado.

*Now Therefore, Be it Resolved,* by the senate of the nineteenth general assembly of the state of Colorado, that the supreme court of the state of Colorado be and it is hereby re-

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quested to give its opinion upon and in answer to the following question:

FIRST: Does it require a two-thirds vote of the senate and the house of representatives of the state of Colorado to change the boundary lines of judicial districts in said state?

SECOND: Does the removal of one county from one judicial district in the state into another judicial district in the state, operate as a removal from office of the judge or judges of the district from which the county is removed?

*And be it Further Resolved,* That a copy of this preamble and resolution be forthwith transmitted to the said supreme court.

I herewith certify the above resolution duly and regularly adopted by the senate of the nineteenth general assembly.

(Signed). S. R. FITZGARRALD,
*President.*

ATTEST: MARK A. SKINNER,
*Secretary.*

*PER CURIAM:*

Section 14 of article VI of the constitution referred to in said resolution is as follows:

"The general assembly may (whenever two-thirds of the members of each house concur therein) increase or diminish the number of judges for any district, or increase or diminish the number of judicial districts and the judges thereof. Such districts shall be formed of compact territory, and be bounded by county lines; but such increase, diminution, or change in the boundaries of a district shall not work the removal of any judge from his office during the time for which he shall have been elected or appointed."

It will be noticed that the increase, diminution, or change in the boundaries of a judicial district referred to in that section is such as is brought about by the formation of a new judicial district, or the abolition of an existing one, and does not relate to a change in boundaries produced by taking one

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county from a district composed of more than one county and adding it to another.

By Senate Bill No. 19, now pending on third reading in the senate, it is proposed to take Teller county from the fourth judicial district and attach it to the eleventh judicial district. The fourth judicial district is composed of more than one county, and that district will remain should the bill pass. Under such circumstances, the bill does not require a concurrence of two-thirds of the members of each house.

We take it that, by the second interrogatory, the honorable senate desires to know what judge or judges will preside over the district court in Teller county in the event that that county is attached to the eleventh judicial district. In that event, the judge of the eleventh judicial district would preside over the district court in Teller county the same as in any other county of that district, and neither of the judges of the fourth judicial district would be removed from office. Our answers are limited to a consideration of the aforesaid section of the constitution.

Mr. JUSTICE WHITE and Mr. JUSTICE BAILEY do not participate.

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[No. 6577.]

## BARROWS v. THE MCMURTRY MANUFACTURING CO. ET AL.

1. CONTRACTS—*Validity—Restraint of Trade*—One purchasing the business of a competitor with the good will thereof may lawfully exact from the seller a stipulation not to carry on the same business within such limit of time and space as is reasonably necessary for the buyer's fair protection. There mere fact that such restraint extends to the limit of the state, or even to a wider territory, is not of itself sufficient to condemn it. The public welfare is the first consideration, and if this is not adversely affected, and the contract imposes upon the seller no greater restraint than is necessary for the protection of the buyer, it is sustained.

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2. MONOPOLY—*Discountenanced*—The law regards with high disfavor any condition that tends to stifle competition in the necessities of life, or in those things which contribute to the general comfort and welfare, and where such condition is asserted the court will make most careful and diligent inquiry to ascertain the very truth of the matter.

3. ——*Evidence*—That a dealer, after purchasing the stock and good will of the competitor, advances the price of the commodity which is the subject of his business, is not sufficient of itself to establish an improper motive as animating his purpose. The question is best determined by the prices demanded by other dealers in the same commodity within the same territory, and the effect of the new quotations upon the general market.

Where after the purchase there still remained in the same field many competitors, and the defendant himself, shortly after disposing of his stock, again engaged in the same line of trade, in violation of his covenant, the contention that the purchase in question tended to create a monopoly was held to be entirely overthrown.

3. DURESS—*Evidence*—Defendant had sold his stock, business and good will, covenanting not to engage in the same line within a limited time and area. On bill brought to restrain the violation of this covenant the defense was that defendant's contract was induced by threats made by the plaintiff. The fact that, very shortly after the sale, defendant had resumed business in the same line was held to negative this contention.

4. CONTRACTS—*Inviolability of—Public Policy*—To a bill to restrain the defendant's violation of a covenant not to engage in a certain business for a limited time and area, the defendant set up the unfounded pretense that the sale of his stock and good will upon which his covenant was founded conferred a monopoly upon plaintiff, or tended so to do. The court, repelling this contention upon the facts shown, observed that while the general welfare is subserved by healthy competition there can be no sound or wholesome public policy which lends approval in the slightest degree to the open violation of personal contracts entered into in good faith, and upon fair consideration; that it is quite as important to the public welfare that evil minded persons be not allowed to transgress with impunity their solemn undertakings, as that the public should have protection in other respects.

*Error to Denver District Court.*—Hon. GREELEY W. WHITFORD, Judge.

Messrs. DAVIS & WHITNEY, for plaintiff in error.

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Messrs. CRANSTON, PITKIN & MOORE, for defendants in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The action was by defendants in error against Stanley M. Barrows, plaintiff in error, to enjoin him from continuing to violate the terms of a certain contract entered into May 5th, 1906, between himself, his sister and brother of the first part, the Denver Plate Glass Company of the second part, and the defendants in error of the third part. The defendant was the largest stockholder in, and president and general manager of, the Denver Plate Glass Company, a corporation engaged in the business of handling paints, varnishes, and plate and window glass in Colorado and neighboring states. The McMurtry Manufacturing Company and the McPhee & McGinnity Company, plaintiffs, were engaged in similar business in about the same territory. The chief place of business of the three companies was Denver, where their main offices were located. Under the contract the entire stock in trade of the Denver Plate Glass Company, except a portion of the paint stock, was sold to the plaintiff companies, including the good-will of the company and that of Stanley M. Barrows and his brother and sister. The amount charged and paid for the good-will was $2,500.00. Among other things, the contract contained the following:

"And the parties of the first part and each of them agree with the third parties that if there is a consummation of this deal, until May 1st, 1916, they will not, nor will any of them, engage directly or indirectly in any business in the state of Colorado, which carries, handles or sells paints, varnishes or glass, or accept employment with or work for any house or business which handles any such goods or merchandise or class of business, or invest any money in or become stockholders or directors in any company or corporation which in any way carries on in the state of Colorado any class of business similar to that heretofore carried on by second party."

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In substance, the complaint alleges that defendant violated this covenant, in that, soon after the consummation of the sale, he not only engaged in the glass business himself, but was instrumental in the organization of certain corporations within the state for like purposes, one of which, in particular, the Independent Glass Company, was incorporated within two weeks after the execution of the contract. The defendant answered that the contract is against public policy, secured under a collusive and fraudulent agreement for the purpose of creating a monopoly in restraint to trade, and therefore void; and further, that it was executed by the defendant under duress, and for that reason unenforcible. A replication denied the charges of duress and conspiracy and other affirmative defensive matter. The court, without a jury, upon hearing found the issues joined generally for the plaintiffs, with specific findings as follows:

"That said defendant, Stanley M. Barrows, received and obtained a good and valuable consideration for the execution of said agreement, and for the making of the personal covenants made by him and contained therein; that the said contract was not executed by him under duress of any kind, nor under intimidation or coercion of any kind, but was executed of his own free will and volition, and solely and alone for the consideration arising therefrom, and for the benefits he would receive from the payment of the moneys therein agreed to be paid; that neither the said contract nor any part thereof was or is invalid or void; that no agreement or covenant therein contained was or is in restraint of trade, and that the agreements therein contained made by the defendant, including the agreement contained in said tenth paragraph, were and are reasonable and fair, and were necessary to protect the plaintiffs in the purchase made by them of goods, wares and merchandise, and good-will.

Second. The court finds, from the evidence, that said contract was not obtained by plaintiffs for the purpose of, nor with the intention of, securing or obtaining any monopoly of

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any kind, at any place, of any business, trade, occupation or calling, and that no monopoly of any kind was in any way obtained by plaintiffs, through or because of the execution or consummation of said contract, or at all. The court finds from the evidence that neither the said written contract nor any agreement therein contained was ever in any way waived or cancelled, or discharged by plaintiffs, or any of them, and that the said contract and all of the agreements made by plaintiffs have been fully kept and performed by them, and that said contract is now in full force and effect, and that plaintiffs are entitled to have the same specifically enforced and carried out.

Third. The court, from the evidence, specifically finds that each of the defenses interposed in the answer of defendant is not sustained by the evidence, and on all of said defenses and on all of the issues herein joined, the court finds for the plaintiffs.

Fourth. The court finds that the defendant, Stanley M. Barrows, from time to time, and frequently and continuously, by various and sundry pretenses, practices, devices and machinations, both directly and indirectly, has sought to evade, and has evaded, and has infringed and violated the terms of said agreement, and more particularly the provisions of paragraph 10th thereof; that he, the said defendant, has been and is associated with the Independent Glass Company, a corporation doing business in Denver and throughout the state of Colorado, and which corporation was organized for the purpose of carrying, handling and selling, and which corporation has carried, and does carry, handle and sell glass in Denver and throughout the state of Colorado, and that he has worked for said The Independent Glass Company, has taken orders for it and has sought to build up its business in divers ways, and to deprive the plaintiffs of the benefit of the agreements made by the Denver Plate Glass Company and the defendant in said written contract of May 5, 1906, and that through said the Independent Glass Company he has been and is engaged in doing business in the state of Colorado, and handling and selling

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glass therein, and that the plaintiffs have suffered, and will continue to suffer, great and irreparable injury by the violation of said contract by defendant, unless they receive the protection of a court of equity.

Fifth. The court further finds from the evidence that the said defendant has, under the guise of conducting the business of an agent for a plate glass insurance company, kept his office in the same room with the said the Independent Glass Company, and has been therein engaged in directing, or aiding in directing, the business of the said the Independent Glass Company, and that the practices and conduct of the defendant have been such that in order to make effective the said contract of May 5, 1906, and to protect the plaintiffs therein, it will be necessary for the court to restrain the said defendant, among other things, from continuing to maintain his office or place of business with the said the Independent Glass Company, during the period provided for in said contract, to-wit, up to and including the first day of May, 1916."

A judgment and decree restraining the defendant from further acts in violation of the terms of the contract was accordingly entered. To review which defendant brings the case here on error.

The main question is whether that part of the contract wherein and whereby the defendant agreed and undertook not to engage in the glass business within this state for a period of ten years, is void as being in restraint of trade, and thus against public policy. The defendant contends that it is, and predicates error on the fact that the court below held a contrary view.

That one may lawfully covenant to refrain from pursuing a particular business within the limits of a certain territory, even if it be an entire state, if the restraint thereby enjoined is reasonable and affords only a fair protection to the one in whose favor it is imposed, is no longer an open question. The following general rules applicable to contracts of this character are found in Eddy on Combinations, sec. 688 *et seq.*:

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"It will be found that in the earlier days contracts in restraint of trade were looked upon with great disfavor by the courts. The attitude of the courts in this respect has greatly changed, and the most enlightened tribunals not only consider contracts in restraint of trade with favor, but look upon them as essential to the well being and progress of the community. It is not seldom, however, that even now the courts, carried away by the earlier decisions, arbitrarily pronounce contracts, which as a matter of fact appear entirely reasonable under all the circumstances, to be void, not so much because they are unreasonable as because they seem contrary to some earlier authorities.

Contracts in restraint of trade should be interpreted in the light of the following propositions:

(a) The right to contract is fundamental to all social organization.

(b) Good-will is property, and as such is subject to transfer like any other species of property; and in its enjoyment the purchaser is entitled to exactly the same measure of protection that is afforded the purchaser of tangible property; the law should not permit the vendor to regain possession, contrary to the terms of his agreement, of all or any part of that which he has sold.

(c) All contracts made for the protection of the purchaser of good-will should be strictly enforced, unless it clearly appears that they are so unreasonable in their terms as to deprive the vendor or the party bound of valuable rights, without any corresponding benefit to the purchaser; even under such conditions a contract should be enforced wherever it is possible to so divide it as to declare it binding over such territory and for such time as are reasonably necessary for the protection of the purchaser, and declare it void as to such time and such territory as are not necessary for the protection of the purchaser. It will be found that it is occasionally possible for courts to hold the contract divisible in this respect.

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(d) A contract in restraint of trade being the contract by which the good-will of a profession, trade of calling, or of a business or enterprise, is sold, the courts should look with favor upon such contracts and enforce them, except in those cases where the enforcement would be manifestly inequitable and amount to the enforcing of a contract that is void for want of consideration.

(e) The consideration for a contract in restraint of trade being that which is paid for the good-will of the profession, trade, calling, business or enterprise in question, it is obvious that the entire consideration is met by the transfer of the entire good-will, and any agreement which arbitrarily binds the vendor beyond the territory and the time necessary for the protection of the good-will transferred is without consideration."

And in Hammon on Contracts, at sec. 244a, the rule respecting agreements of the kind under consideration is thus clearly stated:

"In reference to time and place, while it has always been held in the American states that a promise not to engage in a particular business within reasonable limits within the state is valid, even though the duration of the agreement is unlimited, the doctrine of a few of the earlier cases was that a promise not to carry on a particular business at any place within the state was illegal *per se,* because it would compel the promisor to transfer his residence and allegiance to another state in order to pursue his vocation. This reasoning, however, was hardly applicable to the several states of the Union, which form one entire nation, and, except in a few states, the doctrine no longer prevails, and, accordingly, the validity of a stipulation not to carry on a trade within the state ordinarily depends upon whether it is reasonably necessary for the protection of the promisee. If it is, it is lawful; otherwise, not. Some courts, applying the same principle, hold that an agreement in restraint of trade may be valid, even though it is general as to space, if the promisee requires its enforcement to

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protect him. This doctrine is the logical result of the conditions of modern trade.

As generally laid down, the rule is that an agreement in restraint of trade is valid if the restriction does not go, as to its extent in space or otherwise, beyond what, in the judgment of the court, is reasonably necessary for the protection of the promisee, regard being had to the nature of the trade or business."

The bare fact that the restraint is applied to an entire state, or even to a wider territory, is not of itself sufficient to condemn and nullify a contract of this sort. The public welfare is the first consideration, and if it be not adversely affected thereby, the contract should be sustained, if it is reasonable, and imposes upon the party bound no greater restraint than is necessary for the fair protection, within the plain purpose and meaning of the contract, of the party for whom protection is intended. Such now is practically the universal criterion by which contracts of this character are to be adjudged; that is, the question of whether the contract, under the circumstances of each particular case, is reasonable or unreasonable is the controlling factor.

In Beach on Modern Law of Contracts, secs. 1569, 1575, the following is stated:

"The tendency of modern thought and decisions has been no longer to uphold in its strictness the doctrine which formerly prevailed respecting agreements in restraint of trade. The severity with which such agreements were treated in the beginning has relaxed more and more by exceptions and qualifications, and a gradual change has taken place, brought about by the growth of industrial activities, and the enlargement of commercial facilities which tend to render such agreements less dangerous, because monopolies are less easy of accomplishment. Whether the restraint be general or partial is no longer considered a material question. * * *

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The modern doctrine is well-nigh universal that when one engaged in any business or occupation sells out his stock in trade and good-will or his professional practice he may contract with the purchaser and bind himself not to engage in the same vocation in the same locality for a time named and he may be enjoined from violating this contract. * * *."

The following authorities, with many others, announce the law to be as stated in the foregoing quotations, and uphold the doctrine that whether the restraint is general or partial, widely extended or narrowly limited, is in and of itself alone immaterial: *Harrison v. Glucose Sugar Refining Co.,* 116 Fed. 304; *Anchor Electric Company v. Hawkes,* 171 Mass. 101; *Bancroft v. Union Embossing Co.,* 72 N. H. 402; *Beal v. Chase,* 31 Mich. 490; *Diamond Match Co. v. Roeber,* 106 N. Y. 473; *Fisheries' Company v. Lennen,* 116 Fed. 217; *Oregon Steam Navigation Co. v. Winsor,* 87 U. S. 64; *Trenton Potteries Co. v. Oliphant,* 58 N. J. Eq. 507; *Swigert v. Tilden,* 121 Ia. 650; *Oakdale Manufacturing Co. v. Garst,* 18 R. I. 484; *National Benefit Co. v. Union Hospital Co.,* 45 Minn. 272; *Gibbs v. Baltimore Gas. Co.* 130 U. S. 396; *National Enameling & Stamping Co. v. Haberman,* 120 Fed. 415; *Wood v. Whitehead,* 165 N. Y. 545.

But we are not without authority in our own state upon the precise question under consideration. In *Freudenthal v. Espey,* reported in 45 Colorado at page 489, the law respecting such contracts, from its incipiency in the early English cases to the present, is reviewed, analyzed and applied. In the light of that decision it is unnecessary to enter upon a more exhaustive discussion to ascertain the rule in this jurisdiction applicable to the contract in question, for the doctrine is stated so plainly in that case that we have but to examine the conditions of this one and apply the rule there announced to them, since each case is to be resolved on its own particular facts. —*Harrison v. Glucose Sugar Refining Co., supra; Oregon Steam Navigation Co. v. Winsor, supra; Alger v. Thacher, supra.* In *Freudenthal v. Espey, supra,* both parties were

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physicians; the defendant, a young practitioner, agreed not to enter "the practice of medicine, surgery or obstetrics, or the branches of either, in the city of Trinidad," either directly or indirectly, "for the full period of five years," if within that time he should quit the employment of the plaintiff, an old practitioner, to whom he was bound by contract as a stated salary for that period; there was a sufficient consideration; the defendant left the employment of the plaintiff before he was entitled to, and immediately engaged in and continued the practice of medicine at Trinidad contrary to his agreement not to do so. Upon suit by plaintiff for damages for such breach, and injunctive relief, defendant relied upon the invalidity of the restrictive covenant in the contract as a defense. At page 493 it was there said:

"Expanding commercialism, advancing science and arts, the desire and necessity for education, and the spirit of the age, however, eventually impressed the judicial mind with the necessity of remodeling the rule to meet the needs and requirements of men. It was recognized that both public interest and private welfare often render engagements not to carry on a trade or to act in a profession in a particular place for a limited time, proper and even beneficial.—*Mallan v. May,* 11 M. & W. 653; *Homer v. Ashford,* 3 Bing. 326; *Herreshoff v. Boutineau,* 17 R. I. 3.

Thus impressed the courts sought to meet such requirements by first fusing into the law a distinction between sealed instruments and simple contracts. This distinction being without reason, and not founded upon principle, soon disappeared, and the more logical distinction between general and limited restraint of trade grew and found favor with the courts. The latter distinction appeared as early as *Broad v. Jollyffe,* Cro. Jac. 596, in which it was held that a contract not to use a certain trade in a particular place, was an exception to the general rule, and not void. The seed thus sown did not fully fructify, however, until the leading case of *Mitchell v. Reynolds,* 1 P. Wms. 181, by which the attempted distinction between

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sealed contracts in restraint of trade, and those not under seal was abrogated, and the distinction between general and limited restraints, or rather the true distinction, to-wit, between unreasonable and reasonable restraints was fully established."

And again at page 502 this is declared:

"Agreements like this must be construed with reference to the objects sought to be obtained by them. The object here is the protection of one of the parties against competition in his profession. The nature of the business to protect was a medical practice, extending far beyond the limits of the city of Trinidad; that the covenantee possessed this business, and the knowledge and the skill that enabled him to acquire it. Certainly in limiting the restriction to the city of Trinidad and for the period of five years was only affording 'a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public.' The restraint was no larger than the needs of the covenantee required. It was of material benefit to him, and was not oppressive on the covenantor, nor was it in any sense injurious to the public. The contract is in no wise forbidden by any principle of policy or law. The defendant can be as useful to the public at any other place as at Trinidad, and the interests of the community, elsewhere, are as important as they are there."

And in that case the court approves the rule as stated in *Horner v. Graves,* 7 Bing. 743, in the following quotation:

" 'We do not see how a better test can be applied to the question whether reasonable or not than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either; it can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public, is void on the ground of public policy.' "

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While it is true that in the *Freudenthal* case the precise facts found in the case at bar were not present, still in so far as an application of the law be concerned, there is no essential difference between them. The *Freudenthal* case brought up for the first time in this state a direct consideration of contracts in restraint of trade, and it became necessary to examine and analyze the cases on this subject, both ancient and modern, and to note the history and development of the law on the subject, and the growth of the modern as distinguished from the ancient rule, so that the one best adapted to present needs should be approved for this commonwealth, with the result that the doctrine of the *Freudenthal case,* as indicated by the foregoing quotations from that opinion, respecting such contracts, is the one to which we are committed.

*Alger v. Thacher,* 19 Pick. 51; *Tuscaloosa Ice Manufacturing Co. v. Williams,* 127 Ala. 110; *and Consumers' Oil Co. v. Nunnemaker,* 142 Ind. 560, are relied upon by plaintiffs in error as upholding a contrary doctrine to that here announced, and requiring a reversal of the judgment. A careful examination of the decisions in these cases show that in none of them is the rule which we adopt denied or modified. The restraint attempted was found to be unreasonable, upon the facts of each of those cases, and they are therefore practically in accord with our views. The Illinois and California cases, *Lanzit v. Sefton Manf. Co.,* 184 Ill. 326; *Union Strawboard Co. v. Bonfield,* 193 Ill. 420; *Wright v. Ryder,* 36 Cal. 342; and *More v. Bonnett,* 40 Cal. 251, may fairly be said to announce a different rule; but they stand substantially alone, and we are not disposed to approve or follow them.

Upon the contention that the contract was the result of a conspiracy to create a monopoly, the facts show that the three companies to the contract operated in practically the same field, throughout Colorado and in neighboring states. Mr. Barrows testified that the business of the Denver Plate Glass Company, at the time of sale, extended over Montana, Idaho, Wyoming, Nebraska, South Dakota, Kansas, Colorado, New Mexico,

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Texas, Arizona and Utah. It is clear from the uncontroverted testimony of several witnesses that no monopoly could or did result from the contract in question; that there were many dealers in glass in Denver and that competition was sharp. The witness Mineheart said:

"Q. I wish you would state to the court in your own way what the situation was in the city of Denver and what it was after May, 1906, with reference to whether the McPhee & McGinnity Company and the McMurtry Manufacturing Company had any monopoly?

A. The McPhee & McGinnity Company carry a large stock of plate glass. The McMurtry Manufacturing Company also carries plate glass. The Independent Glass Company carries plate glass, and prior the Denver Plate Glass Company carried plate glass. After we took over the Denver Plate Glass Company, this company, the Denver Plate & Window Company, was formed, for the purpose of winding up and disposing of the stock that was taken from the Denver Plate Glass Company; also the Hallack & Howard Lumber Company, and the H. W. Bingham Lumber Company. The Salzer Lumber Company, the Fleming Bros., and perhaps a dozen other people took contracts for glass and buy it from St. Louis, Kansas City and Omaha. The market in Denver is by no means closed. It is a physical impossibility to make any arrangement of that kind. The competition in the glass business in Denver in the last eight and a half years, since I have been here, and the competition throughout the country has been fierce; the history of the glass business has never seen the state of affairs that has existed in the past three years."

McMurtry and McPhee, as well as Williams, a witness for defendant, testified to the same effect. The testimony shows conclusively that the glass business was in a demoralized condition, in Denver and throughout the state, prior to the sale, as a result of the unbusinesslike policy of the defendant in carrying on the affairs of the Denver Plate Glass Com-

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pany; that it was impossible at that time to make a fair or reasonable profit from the business at all.

In cases where a claim of this sort is made the courts will make most careful and diligent inquiry to ascertain whether there is any encroachment on the public welfare. The law looks with high disfavor upon any condition which tends to stifle the free and unimpeded course of competitive buying and selling in the open market of commodities which are necessities, and contribute to the general comfort and well being of humanity. But it is not a judicial province to presuppose that such a condition exists, when as matter of fact it does not. It is sufficient to say, upon this branch of the case, that the testimony introduced by defendant, in support of the contention that the contract tended to create a monopoly, considered in the most favorable light for that purpose, utterly fails to establish that such was its effect. The selling schedule adopted by the plaintiff companies, after purchasing the stock of defendant under contract, showed an advance over the price at which sales had been made before the purchase, and this was strongly relied upon to prove that the securing of the contract was part of a collusive and fraudulent scheme to create a monopoly. This alone is not sufficient to prove such claim. The single fact that the plaintiffs raised the price of glass after purchasing the Denver Plate Glass Company's stock and good-will, as well as the good-will of the defendant, does not show an intent even to create a monopoly, much less that one was in fact created; more especially is this true where the testimony discloses that the defendant had by his business policy, prior to the time of sale, completely demoralized the glass market and fixed prices that were ruinous to the trade. If the prices quoted after the purchase were exhorbitant, and tended to show the existence of a monopoly, that could be best made to appear by a comparison with the prices at which other dealers in glass generally throughout the territory had been and were selling it, and the effect of the new quotations upon the general market, rather than by a comparison with the cut prices at

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which the plaintiffs and defendant themselves had handled it just prior to the purchase of the business of defendant. The fact that, through organizing the Independent Glass Company only a short time after he had disposed of his stock in trade and good-will to the plaintiffs, the defendant engaged in that line again, is in and of itself alone a complete refutation of his contention that a monopoly had been effected. At most, only one competitor was removed by the purchase, and its tendency to create a monopoly is too remote for serious consideration. In a case like this, from a trade standpoint, the interests of the public was practically unaffected by such purchase. There simply has been the substitution of one tradesman for another. The plaintiffs had no control over the supply, numerous other competitors remained, fresh capital was entirely free to enter the field, and would certainly have done so had prices been held unreasonably high. No other concerns were purchased, and, as shown by the testimony, there were many dealers in the field competing for business. The plaintiffs themselves were *bona fide* competitors, as were also eastern jobbers. The field was open to all comers, and there is little or no danger that the public will suffer from lack of persons to engage in a profitable business. Under the conditions shown to exist, it was impossible to create a monopoly through the contract in question; it neither did or could confer a special or exclusive privilege. To hold that the purchase of a single business, in a wide field occupied by numerous competitors and open to all who might desire to engage in that business, is invalid, as tending to create a monopoly, would be to prohibit the purchase by any merchant of the stock in trade and good-will of another, carrying on a like business in the same place, and and would be utterly inconsistent with a free exercise of the right of contract.

The plain truth is that the defendant was carrying on an unbusinesslike warfare, it may be for the express purpose of compelling some one to buy him out. It was entirely proper, under the facts of this case, for the plaintiffs to do so, since

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the defendant persisted in the employment of unfair methods in the conduct of his business. While it is doubtless true that competition is the life of trade, it is also equally true that competition of a certain sort almost inevitably leads to disaster, not alone to those immediately concerned, but to the public as well. It is safe to say that the general welfare is best served by healthy competition, which allows business enterprise, when conducted with energy and skill, to gather fair returns upon the ability, industry and capital employed. While ruinous competition, which demoralizes an industry and business, and prevents reasonable returns on the investment, may sometimes bring temporary gain to the public, must, in the very nature of things, finally result in general and permanent loss and disaster. The record wholly fails to support the claim of defendant, that the contract in question either did or could create for the plaintiffs a monopoly of the business under consideration.

Neither is the contention that the contract was executed by the defendant under duress, and therefore not binding, well founded. The testimony that threats were made against him by certain members of the plaintiff companies a month or so prior to the execution of the contract is flatly denied. It is manifest that even if such threats were made, they had little if any effect upon the defendant, for almost immediately after the sale, having received full consideration for his business and good-will, he re-engaged in the same line from which, as is claimed, such threats had driven him. From all of the testimony the conclusion is irresistible that the contract was voluntarily executed for the express purpose of consummating a sale, which upon the record showing was highly advantageous to the defendant, and out of which he secured a large price for his stock in trade, together with twenty-five hundred dollars cash additional for the good-will of the business.

It may not be amiss to here suggest that there can be no sound and wholesome public policy, which operates in the slightest degree to lend approval to the open disregard and violation of personal contracts entered into in good faith, upon

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good consideration. It is quite as important, as a matter of public interest and welfare, that individuals be not allowed, with impunity, to transgress their solemn undertakings, advisedly entered upon, as it is that the public have protection in other respects. Where one is so lost to a sense of moral obligation as to accept a full consideration for his stock in trade and good-will, upon express condition that he refrain from again entering that business for a limited time, within a certain territory, and then immediately, having pocketed the fruits of the agreement, deliberately and wilfully ignores the controlling condition thereof, courts should certainly not hunt for legal excuse to uphold him in such moral delinquency. On the contrary, in the interests of the general public, and to discourage bad faith conduct of that sort, wherever, without violation of legal principles and public policy, it may be done, contracts like the one under discussion should be rigidly upheld and enforced. A recent expression of the English court of appeals on this subject, in *Underwood v. Barber,* 68 L. J. Ch. Div. 201, meets with our cordial approval, and is as follows:

"If there is one thing more than another which is essential to the trade and commerce of this country, it is the inviolability of contracts deliberately entered into; and to allow a person of mature age, and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken, is *prima facie* at all events, contrary to the interests of any and every country."

To like effect are *Casserleigh v. Wood,* 14 Colo. App. 265, and *Swigert v. Tilden, supra.*

The conclusions announced in this opinion have been reached by the court upon a full, careful and independent examination and consideration of the testimony brought up and the complete record in the case. Fortunately, however, it appears that the honorable trial judge, who met the witnesses face to face, heard them under oath, observed their demeanor on the stand, marked any and all conflict of testimony, made full and explicit findings, all amply supported by evidence, al-

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though it may well be that on some points there was conflicting testimony, in harmony with the views we sustain. The result and effect of those findings were to establish: First. That plaintiffs below had no intention or purpose of obtaining a monopoly and obtained none; Second. That the restrictive clause of which complaint is made was reasonable and necessary to the fair protection of the plaintiffs in the enjoyment of the business and good-will purchased by them, and was in no sense contrary to public policy; Third. That the defendant executed the agreement freely, and received a good and adequate consideration therefor; and Fourth. That the plaintiffs have never at any time waived any right under the restrictive clause of the agreement, the terms of which the defendant had violated and was continuing to violate.

It is manifest, on principle, authority and public policy, that the agreement entered into between the defendant and plaintiffs should be given full effect, according to its very terms; and it is also equally plain that both the law and the facts abundantly support the findings of the court below and the judgment and decree entered.

Every person must pay the penalty for the wrong he does. The defendant is no exception to the rule. The law of compensation is fixed and certain. The defendant has wilfully violated and ignored the terms of a lawful contract, entered into in consideration of a large sum of money paid him, which he retains. By these acts he has committed a wrong and must pay the price. It was so adjudged and decreed by the trial court, and that judgment and decree meets our sanction and approval. *Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 6720.]

## THE PINNACLE GOLD MINING CO. ET AL. V. POPST ET AL.

1. JUDGMENTS—*Void or Voidable—Collateral Attack*—A decree rendered by a court which has not acquired jurisdiction, and where this absence of jurisdiction appears by the record, is void, and may be assailed directly or collaterally.

If there be any jurisdictional infirmity, not apparent by the record, the judgment is voidable merely, and in full effect until reversed, set aside, or declared void, in an action brought to try the very issue.

Mere error or irregularity though sufficient to reverse the decree on appeal or error brought, has not the effect to render it void.

Where a court proceeds to hear and determine a cause without service made for the period prescribed by statute for defendant's appearance, the judgment is void.

2. ADMINISTRATOR'S SALE OF LAND—*Petition*—The petition of an administrator for leave to sell the lands of his intestate for the payment of debts, which conforms substantially to the requirements of the statute is sufficient.

3. ——*Decree—Presumptions*—It is presumed that the county court in directing the sale of an intestate's land, pursuant to the statute, found from evidence produced at the hearing that the personalty was not sufficient to discharge the decedent's debts, and this finding is not to be overthrown by evidence that the court was mistaken.

The personal estate of the decedent was shown by the inventory and appraisement to have a value largely in excess of his debts. The petition averred that this value was wholly prospective, the property, aside from certain exempt household goods, consisting of mining stock not susceptible of sale at any price. On bill in the district court to vacate the sale, the presumption was indulged that the court heard evidence and found this averment to be true.

4. ——*Relief in Equity—Evidence*—In the same case, there being no evidence that the action of the county court was founded in fraud, *held*, that it was not competent to receive evidence that, in fact, there was no necessity to make sale of the real property to discharge the decedent's debts.

5. ——*Widow's Allowance a Debt*—The widow's allowance is a debt of the estate, for which, if the personalty be insufficient, the lands pertaining to the estate may be sold.

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6. PROCESS—*Return—Evidence to Contradict*—To contradict the sheriff's return of the service of *mesne* process, and the recitals of the record declaring service, the evidence must be clear, unequivocal, and sufficient to exclude all reasonable doubt.

The return of the service of a summons was supported by the testimony of the officer who made it, and the attorney who directed it. Testimony of one of the defendants to the proceeding that eleven years prior to his deposition, and when he was a mere boy, necessarily having no conception of the purpose or effect of legal proceedings, he was not served with the summons, no circumstance being shown to fix the occasion in his mind, is not sufficient.

The question being whether the summons was served on the 22nd or 29th of the month, a certified copy from the docket kept in the sheriff's office, showing service on the latter date; the account kept by the keeper of the livery stable at the place of service, showing that the officer who made the return had a certain conveyance on the 29th, it not being shown for what purpose, and the statements of the officer, afterwards made, that whatever appeared in the sheriff's docket was true, *held*, insufficient to overthrow the return which showed service on the 22nd.

The officer's return is not to be impeached by a record kept in his office; nor by his statements orally made at a later date.

7. DISTRICT COURT—*Jurisdiction*—The district court has no jurisdiction to review the judgments of the county court and vacate them for error.

8. EQUITY—*Purchase Bona Fide—Notice—Presumptions*—Where it is sought to set aside the title of one who is admitted to have purchased for value, without actual notice of an alleged fraud invalidating his title, upon evidence of matters putting him upon inquiry, it will not be presumed that inquiry on his part, diligently pursued, would have resulted in the discovery of any other or different facts than those which the complaining party establishes on the trial.

The evidence produced to establish constructive notice examined and held insufficient.

*Appeal from Teller District Court.*—Hon. JAMES OWEN, Judge.

Mr. FRANKLIN E. BROOKS, Mr. MICHAEL B. HURLEY, Mr. GEORGE W. BIERBAUER, Mr. GUY P. NEVITT and Mr. H. ALEXANDER SMITH, for appellants.

Mr. CHARLES C. BUTLER, for appellees.

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Mr. JUSTICE GARRIGUES delivered the opinion of the court:

John Popst died intestate May 15, 1895, owning an undivided interest in unpatented mining lode locations in the Cripple Creek district. He left as his heirs, his widow Honora Popst, and eight minor children for whom she was appointed guardian. John Nolon, the administrator, under an order from the county court, sold the estate's interest in the Brindsmaid and Uncle Sam locations at public sale, to Frank Dodson. By mesne conveyances the title to the Brindsmaid passed to Farnsworth, who patented it, and conveyed it to the Pinnacle company, which conveyed a portion to the Flying Cloud company. The Blanche company acquired the Uncle Sam. Before this suit was commenced, two of the children, George M. and John F., became of age and deeded an undivided 1/32, and the widow deeded an undivided 1/6 interest in both locations to S. A. Pipps and W. R. Gillpatrick in consideration for which they were to bear the expense of this litigation. George M. Popst, John F. Popst, Honora Popst, S. A. Phipps and W. R. Gillpatrick individually, and Mary, William, Michael, Hugh, Harry and James Popst minors, by Honora Popst as guardian commenced this suit July 2, 1902, against The Pinnacle Gold Mining Company, The Flying Cloud Gold Mining Company, John Nolon and the Blanche Gold Mining Company. The subject of the action was the Brindsmaid and Uncle Sam locations; the object of the action was to recover the title that had been divested by the administrator's sale of real estate to pay debts. The court found all the issues in favor of the children; also in favor of Phipps and Gillpatrick as to the 1/32 interest conveyed to them by George and John. It found against Honora Popst; also against Phipps and Gillpatrick on the 1/6 interest conveyed by her. It declared the county court judgment void, and ordered it, the administrator's sale, the certificate thereof, order approving it, administrator's deed, patent to Farnsworth, and all the mense conveyances from Dodson to

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appellants, annulled and set aside. It found these were clouds which it ordered removed from the title of those in whose favor it found. The Pinnacle and Flying Cloud companies appealed, the Brindsmaid being the only property affected by the appeal.

There were four issues involved, first, that the county court acquired no jurisdiction over the proceedings to sell real estate to pay debts, because the petition failed to state necessary jurisdictional facts, and the order contained recitals showing the court acted without jurisdiction. Second, that no summons was in fact served on the children, though the decree recites, and the return shows they were personally served. Third, that the summons was not in fact served ten days prior to November 2, 1895, though the return shows and the decree finds ten days prior service. Fourth, that the purchaser at the administrator's sale fraudulently purchased the locations for the administrator and his associates, for an inadequate price, of which fraud appellants had notice. The district court made no specific findings on any issue; but found all of them in favor of the children, which has compelled us to review all the issues and a very voluminous record. To make the case intelligent, we feel obliged to set forth rather fully the petition and order of sale, as follows:

PETITION FOR SALE OF REAL ESTATE.

Filed October 21, 1896.

State of Colorado,

ss.

County of El Paso.

In the County Court.

In the matter of the estate
of George Popst, deceased.

Petition for the sale of real estate.

John Nolon as administrator of the estate of George Popst, shows the court: That the amount and value of the personal estate belonging to deceased at his death, as shown by the inventory and appraisement herein, was $4,108.00; that of

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said amount, the $108.00 consists of the household goods and furniture which are exempt from sale for the payment of debts; that the $4,000.00 consists entirely of 72,499 shares of the capital stock of The Mineral Rock Mining Company, which stock has no market or salable value at this time, and cannot now be sold or disposed of, although your petitioner has used every effort to secure a sale thereof. That while the stock has now no market or salable value, it has a prospective value by reason of the favorable location of the property, and on this account something is likely to be realized from it for the estate in the future; that for this reason none of the estate's personal property has been sold; that the amount of claims allowed against the estate, and the amount still existing and not allowed, as near as he is able to estimate the same, is about $1,000; but he is unable to state what portion thereof has been allowed.

Decedent died siezed of the following interest in real essate:

1/5 interest in the Cristle Lite lode, value $25.00;

1/4 interest in the Sarah Ann McDonald lode, value $25.00;

1/4 interest in the Flying Cloud lode, value $25.00;

1/2 interest in the Brindsmaid lode, value $25.00;

1/2 interest in the Uncle Sam lode, value $50.00;

1/3 interest in the Little Mary lode, value $25.00;

1/5 interest in the Mollie Gibson lode, value $25.00;

1/5 interest in Old Branch lode, value $25.00;

1/5 interest in Roanna lode, value $150.00;

In the Cripple Creek mining district. That they all consist of mining lode locations only, no patents having been issued for any of them. That he believes it will be to the interests of the estate to have its interest in the Roanna, Brindsmaid and Uncle Sam locations sold by order of court for the payment of debts

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for the following reasons: First, because there is no personal property and no funds in the hands of petitioner with which to pay or discharge debts. Second, because said lode mining claims are unproductive, and no revenue can be received from them without much expense, and the assessment work thereon for the year 1896, has not been done, and there is great danger that the estate's interest in the locations may be lost unless the property is sold. That in his judgment, the estate's interest in the claims can be sold to better advantage at private sale than at public auction. That the heirs of decedent are Honora Popst his widow, John F., James, Harry A., Hugh J., Michael, William and Mary Popst, his minor children. Prayer for summons: that he be directed to sell the locations at private sale; that the court aid him in disposing of the property, or otherwise provide for the payment of claims against the estate.

Decree for Sale of Real Estate.

(Filed November 14, 1896.)

State of Colorado,

ss.

County of El Paso.

In the County Court in Probate.

November Term, A. D. 1896.

In the matter of John Nolon, administrator of the estate of George Popst, deceased,

*Petitioner,*

vs.

Honora Popst, widow, John F., George M., James, Harry A., Hugh J., Michael, William, and Mary Popst,

*Respondents.*

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Decree for the sale of real estate to pay debts, filed November 14, 1896.

This day comes John Nolon, administrator and petitioner herein, and the respondents John F., George M., James, Harry A., Hugh J., Michael, William and Mary Popst; also come by George W. Musser as their guardian *ad litem,* and file their answer, and the cause coming on to be heard, and it satisfactorily appearing to the court from the records and files herein, that the respondents have been personally served with summons by the sheriff of this county more than ten days before the return day thereof (November 2), thereupon it is ordered that Honora Popst be called, and she being three times solemnly called in open court by the sheriff, comes not, nor any one for her, but makes default, whereupon it is ordered that the petition be taken as confessed against said adult respondent.

And now this cause coming on to be heard upon the petition taken as confessed as aforesaid, the answer of the guardian *ad litem,* and the exhibits, proofs and testimony produced and taken in open court, and it satisfactorily appearing to the court that George Popst departed this life May 15, 1895, leaving Honora Popst, his widow, and John F., George, Harry A., Hugh J., Michael, James, William and Mary Popst, his children and only heirs at law; that petitioner was duly appointed administrator of his estate, and that letters were duly granted to him, bearing date September 30, 1895, and that petitioner has made a just and true account of the condition of the estate to the court, and that the personal estate is insufficient to pay the debts of George Popst, deceased, and the expenses of administration; and it futher appearing, and the court so finding, that the amount of the deficiency aforesaid, is the sum of $135.50, besides accrued interest there-

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on, and costs; that the petitioner has made and returned to the court an inventory of the real estate of the deceased, and caused it to be appraised as required by law, the appraised value thereof amounting in the aggregate to the sum of $250.00; and it further appearing that the said George Popst died siezed of the following real estate situated in El Paso county, to-wit: 1/2 interest Brindsmaid, 1/2 interest Uncle Sam, and 1/5 interest Roanna lode mining locations, and the court having ascertained that it will be necessary to sell all the interest of the said estate therein to pay the deficiency aforesaid, with the expenses of administration due and to accrue; and petitioner having filed his bond with surety thereon which is approved and acceptable to the court;

It is therefore ordered that said petitioner sell at private sale, 1/2 interest in the Brindsmaid, 1/2 interest in the Uncle Sam, and 1/5 interest in the Roanna mining lode locations to pay the debts now due from said estate, and the costs of administration due and to accrue.

It being the opinion of the court it would benefit the estate to sell at private sale, it is ordered that said premises be sold upon the following terms: for cash upon ten days' notice in the Morning Times, a daily newspaper of general circulation in El Paso county, which terms shall be distinctly set forth in all the advertisements of sale. And if sold at private sale, the real estate shall not be sold for less than the appraised value of each separate parcel; and in no event shall the petitioner herein, either directly or indirectly become the purchaser of any part thereof. And it is further ordered that upon making such sale, and payment by the purchaser, that petitioner execute and deliver to the purchaser a certificate of sale as in the case of sales of real estate upon execution, and report his action to the court; further that the cause stand continued to the next term for the hearing and action upon the report.

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Done in open court the 14th day of November, 1896. On November 27, 1896, the administrator at a duly advertised public auction, on the street in Cripple Creek, sold the estate's interest in the Brindsmaid and Uncle Sam locations to Dodson for $200.00. The sale was approved by the court, and January 4, 1897, the administrator gave Dodson a deed.

2. Discussion has arisen at the beginning, whether the attack on the county court proceedings, is direct or collateral. This kind of a direct attack is usually brought for the purpose of establishing by evidence *aliunde* the record the untruthfulness of its recitals, and to have the voidable judgment resting upon the untruthful record declared void. If the county court acquired no jurisdiction over the proceedings by petition to sell real estate, or even the person by service of summons, and an inspection of the record disclosed the want of jurisdiction, the judgment was void and could be attacked in any action, either directly, or collaterally, whenever and wherever it was brought in question. If there was any jurisdictional infirmity in the county court proceedings which could only be discovered by evidence *aliunde* the record, then the judgment was not void, but voidable, and was good until set aside, reversed or declared void in a suit brought to try that very issue. Where the issue is, that the judgment is void, the trial is by an inspection of the record. Where the issue is, that the judgment in voidable, the trial is by matters *dehors* the record.—*Kavanagh v. Hamilton,* 53 Colo. 157; *Board of Commissioners v. Platt,* 70 Fed. 567; 52 Cent. Law Jour. 420.

3. An inspection of the county court record ordering the administrator to sell real estate to pay debts does not disclose that the order was void on account of the failure of the court to acquire jurisdiction over the proceedings. The petition conforms substantially with the statute, and by the great weight of authority was sufficient to invoke the jurisdiction of the court over the proceedings.—*Nichols v. Lee,* 16 Colo. 147; *Bateman v. Reitler,* 19 Colo. 547; *Mortgage Trust Co. v.*

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*Redd,* 38 Colo. 458; *Kavanagh v. Hamilton,* 53 Colo. 157; *Manson v. Dunconson,* 166 U. S. 533-547; *Kretsinger v. Brown,* 165 Fed. 612; *Iverson v. Loberg,* 26 Ill. 180; *Stow v. Kimball,* 28 Ill. 108; *Goudy v. Hall,* 36 Ill. 313; *Moore v. Neil,* 39 Ill. 256; *Bradley v. Drone,* 187 Ill. 175; *Salter v. Hilgen,* 40 Wis. 363; *Tallman v. McCarty,* 11 Wis. 401; *Blackman v. Mulhall,* 19 S. D. 534; *Magee v. Big Bend Co.,* 51 Wash. 406; *Burris v. Kennedy,* 108 Cal. 331; *Estate of Devincenzi,* 119 Cal. 498; *Sweet v. Ward,* 43 Kas. 695; 18 Cyc. 771.

Mistakes, errors or irregularities are not jurisdictional, and, though they might reverse a case on review, will not render the judgment void.

In *Nichols v. Lee, supra,* (on rehearing) 154, no inventory and appraisement were filed, and it was contended that the filing of these documents was a condition precedent to the right to sell real estate; but this court held the statute meant that whenever it shall appear *after* and not *by* inventory and appraisement; that *after* was a designation of time, not jurisdictional, fixing the order of proceeding; that a failure to file any inventory and appraisement might be an irregularity sufficient to reverse the case on review, but would not prohibit the court from acquiring jurisdiction over the proceedings; that the petition is in effect a complaint, and is sufficient to confer jurisdiction upon the court if it contains enough to call upon those heirs who are parties, to respond; because nothing is taken as confessed, the court must take the testimony and decide the case on the evidence. The county court is a court of general jurisdiction, and presumably it found from evidence produced on the hearing of the petition, that the personality was not sufficient to discharge the debts against the estate. This finding could not be overthrown or reversed on the trial in the district court by evidence showing that the county court was mistaken.

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It is claimed the inventory and appraisement show that the Mineral Rock stock owned by the estate was valued at $4,000.00. They do; but the petition recites that it was the only personal property belonging to the estate, except exempt household goods, appraised at $108.00, selected by the widow at that valuation, as a part of her allowance; that the value of the mining stock was wholly prospective; that it had no market value, and could not be sold at any price. The presumption is that the court heard evidence on this allegation, and found it true, which left the estate with no available assets.

The district court took evidence upon the value of this mining stock to ascertain, as we understand, whether there was a necessity to sell real estate to pay debts when the petition was filed. This it had no right to do, especially in the absence of a direct issue that the finding of the county court was based upon fraud. But waiving the irregularity of admitting this evidence, it shows that at the time the petition was heard, the stock was only worth about one cent or a cent and a half a share. Counsel further claims that the probate files introduced in evidence in the district court show that no claim had been allowed against the estate when the petition to sell was filed. If these files were competent for the purpose of impeaching the findings and judgment of the county court (which we do not decide), still counsel is mistaken as to their effect. The files show that the widow's allowance was fixed at $1,860.00; that the exempt household goods and furniture were appraised at $108.00; that on October 25, 1895, she relinquished her claim to the appraisers' estimate of specific property allowed her as widow's allowance, and, in lieu thereof elected to take the household goods at the appraised value of $108.00, and the balance of the allowance, $1,752.00, in money. This was a year before the petition to sell real estate was filed, and was a claim against the estate, for the payment of which, the administrator, in the absence of personal property from which it could be realized, could resort to the real

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estate. The court was not justified in finding the first issue, that the judgment of the county court was void, against the appellants.

4. If in truth the children were not served with process, though the sheriff's return shows, and the order recites they were, then the judgment was voidable as to them, and the court could declare it void in this suit brought for that purpose.—*Kavanagh v. Hamilton,* 53 Colo. 157.

But before the officer's return, and the court recitals could be overthrown, and the judgment declared void, the proof must be clear, unequivocal and convincing; in other words, beyond a reasonable doubt.—*Kavanagh v. Hamilton,* 53 Colo. 157; *Butsch v. Smith,* 40 Colo. 66; *Baird v. Baird,* 48 Colo. 509; 32 Cyc. 517.

At the time of the death of Popst in May, 1895, the children were of the following ages: Mary 3, William 4, Michael 6, Hugh 8, Harry 10, James 11, George 12 and John 16 years. This trial was in April, 1907, twelve years afterward. The sheriff's return shows the summons from the county court was served in October, 1896, almost eleven years before this trial. All the children except the two eldest, George and John, testified and their evidence was intended to show that none of them had been served with summons. In fact James and some of the others stated positively they were not served, and he being the oldest, we will analyze his testimony. He was a mere boy at that time, and it was a long period in a boy's life before this trial occurred. It is unbelievable that at the time he testified, he could by his unaided memory recollect that no summons was served upon him almost eleven years before. When questioned as to how he knew he was not served, he said because on the date of the alleged service, he had taken dinner with Mrs. Derrity, which, with nothing to aid his memory, was even more astonishing. The most charitable view to be taken of such evidence is that he had no recollection of being served, which in fact is the effect of his testimony. After so long a

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time it would be extremely dangerous to accept the unaided recollection of any person, to overthrow the findings of a court and the return of a sworn officer, and more especially is this true of the statements of children, who have no conception of court procedure.

The return of the officer showed personal service upon these children; the decree recites they were personally served; the attorney who conducted the proceedings for the administrator, testified that he made previous arrangements with Mrs. Popst, who at that time was friendly to and aiding in the proceedings, to have all the children at home so they could be served; and the officer who made the service testified that he went to their home, found the children there according to arrangements of which he had been told, and served them all personally in the manner designated in the return. The evidence on the trial that the children were not served, was negative in character and was not of that clear and convincing nature required to overcome the positive evidence, taken in connection with the official return and court recitals in the judgment. The district court was not warranted in finding the second issue against appellants.

5. The third issue tried was that the summons was served on the 29th instead of the 22nd of October as shown by the return. The summons was prepared and signed October 20, by the attorneys Seeds & Parker, and October 21, was issued by the clerk of the court. The final clause signed by the attorneys, save their signatures, was typewritten, as follows: "Witness our hands on this 20th day of October, 1896. (Signatures)." The clerk issuing the summons, wrote the following: "Given under my hand and the seal of said court this 21st day of October, 1896. (Signatures and court seal)." The return, excepting the day of the month, is typewritten as follows: "State of Colorado, County of El Paso, ss. I hereby certify that I have duly served the within summons on this 22nd day of October, A. D. 1896, upon the within named de-

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fendants, Honora Popst, John F. Popst, George M. Popst, James Popst, Harry A. Popst, Hugh J. Popst, Michael Popst, William Popst and Mary A. Popst, and each of them, by reading the same to them and each of them personally, in the county of El Paso and state of Colorado. W. S. Boynton, sheriff, by J. W. Lupton, deputy." Mrs. Popst testified Lupton came to her home in October, 1896, and served some process, and, while she did not fix the date, an attempt was made to show that it was on the 29th. As the court found against her, and she has assigned no cross errors, we would not consider this question, were it not that all the issues were found in favor of the children, from which it is argued the service on them was on the 29th, notwithstanding the inconsistent position is taken that they were not served at all. The possibility that the court may have declared the judgment void for this reason, compels us to review this matter. The county court was without jurisdiction, under our statute, to try the case on the first day of the term unless respondents were served at least ten days prior thereto. If the service was in fact on the 29th, then the officer's return and the recitals in the order are untrue, the judgment was voidable, and the district court on direct attack could declare it void. It could, however, do this only upon evidence clearly establishing the untruthfulness of the record. No one testified that the service was on the 29th. Plaintiffs' attempted proof consisted of, (1) A certified copy of a record kept in the sheriff's office at Colorado Springs, showing the summons was received and served on the 29th. (2) Records of a livery stable, kept in Cripple Creek, showing that officer Lupton, who made the service, had out a double team on that day from 10 o'clock A. M. to 3:20 P. M. (3) Statements made by Lupton, that whatever the record in the sheriff's office recited, was correct. Under some circumstances, evidence of this character might be admissible for impeachment; but in the first instance an official cannot impeach the return he has made on a writ, by a record kept in

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his office. This court has held that the return is controling, even over the recitals in the judgment, and if defective or erroneous, must be amended. It would be useless to require a return if it could be impeached in another trial by a record kept in the sheriff's office. Conceding the admissibility of a certified copy of such a record, it could have no greater weight than the original, which, while in a proper case it might be admissible for some purposes, could not be used primarily to impeach the return. There was no evidence that Lupton used the rig he obtained on the 29th to make this service. A sheriff's return into court cannot be impeached by his oral statements afterwards any more than can the verdict of a jury by the talk of a gossiping juryman. To uphold such methods would open the door to fraud, and render insecure all legal procedure. When an officer testifies orally in support of his return, which has been attacked, then, upon laying a proper foundation, will be the time to introduce any contradictory records, or prove statements made by him out of court, for the purpose of impeaching his testimony in court. The summons was prepared and issued by Seeds & Parker, attorneys, October 20. The return was typewritten at the same time with the exception and intention that the service would be made on that day. Judge Seeds, a witness for the plaintiffs, testified that the return as originally prepared in his office read: "I hereby certify that I have duly served the within summons on this 20th day of October." That as attorneys they became doubtful of their authority to issue the writ, and to be on the safe side, he went to Colorado Springs the night of the 20th, arriving there the morning of the 21st; had the summons issued by the clerk and returned to Cripple Creek that night, reaching there on the morning of the 22nd, when he gave it to the officer for service. He also testified they had made arrangements with Mrs. Popst to have the children all at home on the 22nd, so they could be served. The original typewritten figures in the return, whatever they had been, were erased with a pen

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and ink, and immediately above was written in ink, "22nd." It is claimed that the erased portion was originally "29" and not "20," and that the erasure and interlineation of "22nd" in ink, constitutes an alteration or forgery made after the endorsement of the return. This is a mere conjecture, wholly unsupported by any evidence. The plaintiffs' own witness, who prepared it, testified that it was originally typewritten "20," exactly as in the summons, and explained the necessity for the change. The officer who made the service testified that he received the summons on the 22nd; that he went on that day to Mrs. Popst's home, where he found all the children and served them; that in making the return he erased the typewritten figures 20 or 29, whichever they were, with a pen, and made the interlineation himself by writing the figures "22" above the erased figures, and that it was in this condition when he returned the writ into court. The attorneys knew that the service had to be made at least ten days before the 2nd day of November, and made a special trip from Cripple Creek to Colorado Springs, consuming two days and nights, for the very purpose of having the summons issued by the clerk within time, and it is unreasonable to believe that after going to this trouble and expense, they kept it until the 29th before giving it to the officer. The children were represented on the 2nd of November by an attorney appointed by the court, and if the return then disclosed that the service was on the 29th, it is most singular that it escaped the attention of the court and all counsel. The district court was not justified in finding the third issue against the appellants.

6. In the fourth issue it is contended that Dodson purchased the Brindsmaid and Uncle Sam locations at the sale for the administrator, of which appellants had knowledge. When a judgment is declared void on account of the fraud of a party, in a suit brought for that purpose, the power of the court in granting relief is exerted against the wrongdoer by enjoining him from collecting the judgment, or if he holds property

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which he has obtained under it, by compelling a reconveyance. It acts upon his conscience. In this case that could not be done, because the judgment of the county court had been fully executed and the property had passed to third parties who had no part in the original transaction. The court attempted to afford relief to appellees by setting aside all the county court proceedings, all the conveyances thereunder, and the United States patent. This was not proper. We have held many times that the district court is not a court of review. The county court is a court of general jurisdiction, and the district court has no power to review and set aside its judgment. Neither do we think in this case it could or should have cancelled the United States patent to Farnsworth. If it found the county court proceedings were void on account of the administrator's fraud, of which appellants had knowledge when they acquired the Brindsmaid, it could have granted relief by declaring them trustees of a constructive trust, and compelled them to reconvey the legal title to the beneficiaries. If they purchased the property with knowledge of the alleged fraud, then they held the legal title in trust for the equitable owners.

There has been some discussion as to whether this attack upon the county court proceedings on the ground of fraud of the administrator is direct or collateral as to appellants. As to the parties to the county court proceedings, the attack is direct; but appellants' claim as to them, it is collateral. In support of their contention they cite *Moore v. Neil,* 39 Ill. 256, where it is said:

"Where a bill in chancery is filed to set aside an administrator's sale, the proceedings should not, perhaps, be regarded as collateral to the former suit so far as it relates to the parties to that suit, but as to the purchasers, whose title derived from the sale is sought to be divested, it is as purely collateral as an action of ejectment."

Also Kerr on Frauds and Mistakes, page 48, where it is said:

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"The transaction being valid until it is avoided, third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded."

And at pages 312 and 313, as follows:

"The right to impeach a transaction on the ground of fraud, has no place as against third parties, who have paid money and acquired a legal right to property, without notice of the fraud. As against a purchaser for valuable consideration without notice, having the legal title, no relief can be had in equity. If a man has paid his money in ignorance of the fact that another party has an equitable claim to the property, a court of equity will not deprive him of the benefit of his legal title, even although his equitable claim be of later date than that of the other party. The rule that a man who advances money *bona fide*, and without notice of the infirmity of the title of the seller, will be protected in equity applies equally to real estate, chattels, and personal estate. The rule is subject to no exception, even in favor of charities."

Also sections 2 and 3 of Van Fleet on Collateral Attack, where it is said: A bill in equity to set aside a judgment for fraud, becomes a collateral attack when it seeks to affect a *bona fide* purchaser under the judgment, that it is direct only when pursued in the time and manner provided by law against one who is not a *bona fide* purchaser.

We do not think it makes any difference in this case because appellees admit appellants were purchasers for value, and that the court could grant them no relief against appellants, unless it found they had knowledge of the fraud. The power to grant relief against appellants turns upon their knowledge of the fraud. This issue then embraces: (1) Proof of the fraud, and (2) Proof of appellants' knowledge thereof.

Appellees admit appellants bought and paid for the property in good faith without actual knowledge of any infirmity in the title; but it is claimed they had constructive knowledge

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of the administrator's alleged fraud. Disregarding mere generalities, the specific matters, which it is contended constitute constructive knowledge, are: 1. Deeding the Brindsmaid and Uncle Sam locations to the Shurtloff Company by Vedder, in which Nolon, the administrator, held stock. 2. Deeding an undivided half interest in the Uncle Sam to Nolon by Mrs. Vedder. 3. The relationship and association existing between Dodson, Nolon, Vedder, Becker and Cree. To intelligently understand this claim, one must be familiar with the circumstances connected with the conveyances. Prior to Popst's death, he and Allen each owned an undivided half interest in the locations. Dodson's title originates from two sources. The first is the Allen-Popst deed, in 1895, purporting to convey to him all the title in the Brindsmaid and Uncle Sam. This chain of title runs from Dodson to N. W. Vedder, December 14, 1895; N. W. Vedder to King, trustee, December 14, 1895; King, trustee, to Shurtloff Company, March 3, 1896.

It subsequently developed that this deed in fact only conveyed the Allen interest, although Vedder supposed at the time, that he bought all the title. He learned afterwards that Mrs. Popst had no authority to convey the undivided 1/4 interest belonging to the children, and that there might be a defeasance of the interest of the heirs in the Popst title by an administrator's sale to pay debts. The title to these two locations from this source after passing to the Shurtloff Company, separates, the Brindsmaid going to the appellants and the Uncle Sam to the Blanche Company. The second source of Dodson's title begins January 4, 1897, in an administrator's deed to the Popst undivided half interest in both locations which was the interest he failed to get by the Allen-Popst deed. From this source of title Dodson conveyed the Brindsmaid to the Shurtloff Company February 1, 1897. This converged the chain of title to the Brindsmaid from each source, into the Shurtloff Company, from which it runs: Shurtloff

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Company to Carnduff, Feb. 1, 1897; Carnduff to Farnsworth, February 24, 1897; U. S. patent to Farnsworth, June 3, 1899; Farnsworth to Pinnacle, March 1, 1901; Pinnacle to Flying Cloud (a part), March 9, 1901.

The Uncle Sam not being involved in this appeal, we would say nothing further about it, were it not that the contention is made that its conveyance throws light upon the transaction. We have already seen that the Allen title to the Uncle Sam, acquired by Dodson by the Allen-Popst deed, reached the Shurtloff Company through a conveyance from N. W. Vedder. After Dodson received the administrator's deed conveying the Popst undivided half of the Uncle Sam, he conveyed this title to it, acquired through the administrator's sale, to Mrs. J. E. Vedder, wife of N. W. Vedder, April 28, 1897, and she on the same date, deeded it to Nolon. The title to this Popst half interest then runs: Nolon to Creighton, December 17, 1897; Creighton to Carlton, October 31, 1897; Carlton to Blanche Company, November 6, 1899. The title to the Uncle Sam derived from the administrator's deed never was conveyed to the Shurtloff Company. The title through the Allen-Popst deed to the Allen undivided half of the Uncle Sam we trace to the Shurtloff Company. It then continues: Shurtloff Company to Mrs. J. E. Vedder, April 29, 1899; Mrs. J. E. Vedder to Carlton, April 23, 1899; Carlton to the Blanche Company, November 6, 1899. In September, 1895, Allen and Mrs. Popst deeded the Brindsmaid and Uncle Sam to Dodson. The evidence shows that N. W. Vedder bought these locations from Dodson for $800.00, which he paid in currency, and that Vedder thought he owned all the title. Nolon, Becker and Cree owned a patented lode called the Shurtloff. They all entered into a mutual agreement to deed these claims to a corporation in which each would receive stock representing his interest. The Shurtloff Company was formed sometime in the winter of 1895-6, to which Vedder deeded the Brindsmaid and Uncle Sam, and under the agree-

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ment received 250,000 shares of stock. Nolon, Becker and Cree deeded the Shurtloff lode to the Shurtloff Company under agreement, and took stock. The Shurtloff claim was a patented lode, beyond any annoyances of conflicts and adverses, and Vedder agreed to put his locations on an equal footing by patenting them and giving a clear title. If he did not, or if anyone became dissatisfied with his title, it was a part of the agreement that all the claims should be deeded back to the original owners. Becker, hearing of the defects in Vedder's title, and rumors of adverses, became dissatisfied, and asked that the properties be reconveyed, which was done in the following manner: The Shurtloff Company deeded back to Nolon, Becker and Cree each an undivided 1/3 in the Shurtloff lode. The mere legal title to the Brindsmaid and Uncle Sam stood in the Shurtloff Company, it did not own them. These locations, after the agreement was rescinded, belonged to Vedder, and he could cause them to be deeded to whomever he pleased. He sold the Brindsmaid to the Pinnacle Company for $2,000.00 and caused the Shurtloff Company to make the deed to the purchaser. This $2,000.00 belonged to Vedder, and he received the money. The Shurtloff Company, Nolon, Becker or Cree received no part of it. Vedder then gave the Uncle Sam to his wife, and had the deed made to her. In this way all the parties to the agreement received their original properties. When Vedder learned the Popst interest in these locations was to be sold at an administrator's sale, he knew it would perfect his title to have Dodson purchase it, and while there is no evidence showing it, it is only natural that he should want him to do so. Dodson bought them at a public, not a private sale, as argued, in which all persons had an equal opportunity to participate, and paid the administrator $200.00 in cash for them. Of course the purchase was intended to perfect Vedder's title. Dodson's intent in bidding in the property, does not make the sale fraudulent, and is immaterial. The intent with which one bids at a pub-

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lic sale, ordinarily at least, cannot invalidate the sale. After Dodson received the administrator's deed, Vedder had him convey the title from this source to his wife, to perfect the title he had given her. Vedder owed Nolon $1,700.00, and Nolon agreed to cancel the debt for an undivided half interest in the Uncle Sam, and this was the consideration for which Vedder had his wife deed a half interest to Nolon. Nolon sold this half interest to Carlton for $2,500.00, got $500.00 in cash, and a note for $2,000.00, payable in one year. Carlton promoted the Blanche Company, to which he deeded the Uncle Sam, and succeeded in paying his $2,000.00 note to Nolon with Blanche Company stock. The other undivided half interest in the Uncle Sam, Vedder sold to Carlton, to whom his wife deeded, and Carlton conveyed the property to the Blanche Company.

The evidence only raises a suspicion that Dodson, in bidding at the administrator's sale, was purchasing for Nolon. The inference is drawn from the subsequent conveyance to Nolon and to the Shurtloff Company, in which he had stock. The undisputed evidence shows that Nolon was a *bona fide* purchaser of the half interest in the Uncle Sam which he bought from Vedder; and though he was a stockholder in the Shurtloff Company, he received no interest in the Brindsmaid, and no part of the consideration for which it was sold. When these matters of suspicion and inference are explained by the undisputed evidence, any presumption of knowledge arising from the conveyances, vanishes. If the Shurtloff Company in fact owned the Brindsmaid and sold it to the Pinnacle Company for $2,000.00, which was paid to the Shurtloff, it seems as though it would have been impossible to so cover up the transaction, that no evidence of it could have been discovered. Appellees produced no other evidence; but rested this issue solely upon the inference arising from the conveyances, and then themselves destroyed the inference by oral testimony. It is claimed in argument that these parties were all partners in

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the Nolon club room, which circumstances makes the transaction look suspicious. The evidence shows that Nolon was the owner of the club room; that Vedder worked for him on a percentage, and that none of the others had any interest in it. Dodson, when he first bought the locations, was not working for Nolon as claimed, and scarcely knew him. Nolon, Becker and Cree were not partners in any business. They owned the Shurtloff lode together, but that could not be called a partnership. Appellants were purchasers for value, and while the law is, if the administrator's fraud, of which they had knowledge when they bought the property, vitiated the sale, equity will bind their consciences and declare them trustees of a constructive trust, and compel them to re-convey, appellees failed to sustain this issue. Appellants paid $2,000.00 for the property in good faith, after diligently investigating the title. They had no actual knowledge of the alleged fraud from any source. If we concede the administrator's alleged fraud, appellees are without relief against appellants, unless the evidence satisfactorily shows they had constructive knowledge; that is, information which if pursued with reasonable diligence would have led to actual knowledge. It will not be presumed that any reasonable investigation appellants might have made would have led them to the discovery of any more or different knowledge than appellees proved on the trial in attempting to establish constructive notice. If the court found the fourth contention in favor of appellees, it was not warranted by the evidence.

The judgment will be reversed and the cause remanded.

*Reversed.*

Mr. JUSTICE GABBERT and Mr. JUSTICE WHITE concur.

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[No. 7105.]

## ALBI MERCANTILE COMPANY V. THE CITY AND COUNTY OF DENVER ET AL.

1. DENVER—*Vacating Street for Viaduct—Effect*—Under sec. 297 of the charter of Denver the fee in a street vacated for the construction of a viaduct remains in the city. It does not revert to the owner of the abutting property.

2. INJUNCTION—*To Restrain Public Work*—The city of Denver has the unquestionable right to construct or cause to be constructed in the public streets, viaducts and approaches thereto. That a structure, erected under proper legislative and municipal authority may so interfere with the access to private property as to entitle the owner to compensation does not afford him an injunction to restrain the erection of it until compensation is made.

*Error to Denver District Court.*—Hon. GEORGE W. ALLEN, Judge.

Messrs. STARK & MARTIN, for plaintiffs in error.

Messrs. HUGHES & DORSEY and Mr. E. I. THAYER, for Union Pacific Railroad Company and The Denver, Northwestern & Pacific Railway Company.

Mr. E. E. WHITTED and Mr. ROBERT H. WIDDICOMBE, for Chicago, Burlington & Quincy Railroad Company and The Colorado & Southern Railway Company.

The city and county of Denver entered into a contract with its co-defendants in error to construct what is commonly known as the Twentieth street viaduct, with an approach on Delgany street, which runs at right angles to Twentieth street. Plaintiff in error owns a lot abutting on Delgany street in front of which the approach on the latter street is constructed. On this lot a two-story building was located, in which plaintiff in error conducted a wholesale and retail mercantile business.

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Prior to the construction of the approach the plaintiff in error brought suit the purpose of which was to enjoin the defendants from constructing it. To the complaint the defendants demurred, on the ground that it did not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to equitable relief, or to any such relief as was sought and prayed for. This demurrer was sustained and plaintiff having elected to abide by its complaint, its action was dismissed. To review the ruling on the demurrer and the judgment rendered, plaintiff has brought the case here on error.

The complaint, so far as material to consider, in addition to the facts above narrated, alleges that the charter of the city and county of Denver provides that a viaduct shall not be constructed unless the council shall have first provided for the vacation of such portion of the street upon the completion of the viaduct over and along which the viaduct is proposed to be constructed. The charter provisions upon which this allegation is based is section 297 of the charter, which is set out *haec verba* in the complaint, and provides that the article of which it is a part shall not affect the power of the council to require railroad companies to construct viaducts and approaches over their tracks at their expense, and may direct such construction by ordinance. It also contains the following: "*Provided*, that no viaduct, bridge or tunnel shall be constructed under this section, unless the council shall have provided for the vacation of the street upon the completion of such viaduct, bridge or tunnel, throughout that portion thereof over, along or under which said public improvement is proposed to be constructed, the fee of the street to remain, nevertheless, in the city and county." The complaint then alleges that the city and county of Denver entered into the contract mentioned without having first provided for the vacation of Delgany street; that since entering into this contract with its co-defendants it has vacated that portion of Delgany street in front of plaintiff's premises by placing a fence across the street

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at Twentieth, and also at Twenty-first street, whereby the public and plaintiff are prevented from the use of that portion of Delgany street between such fences. Facts are then alleged from which it appears that the portion of Delgany street involved had been dedicated for use as a public street about 1873. It is then charged that by reason of the acts of the city and county of Denver, in fencing the portion of Delgany street mentioned, it has vacated that portion thereof, and that the title to that portion of the street, to its centre, in front of plaintiff's premises has reverted to it, and that it now owns the fee thereof. It is alleged that defendants are engaged in constructing the approach on Delgany street; that thereby they have unlawfully entered upon the property of plaintiff; that if the construction of the approach is permitted, it will be impossible for any one to reach and enter plaintiff's place of business; that the light for its building will thus be obstructed; and (quoting from the complaint) "That the acts and contemplated acts on the part of the defendants and each of them constitutes a taking and damaging of private property for public and private use without just compensation, and without any attempt upon the part of the defendants, or any of them, to make any compensation whatever therefor; that no condemnation proceeding has been instituted, nor any steps taken for the purpose of ascertaining and paying to plaintiff the damages which it will sustain; that unless defendants are restrained from this unlawful taking and damaging of plaintiff's property and business, in violation of its rights under the constitution of this state, this plaintiff will suffer great and irreparable loss, damage and injury; and that it has no adequate and complete remedy at law."

The complaint concludes with a prayer that a temporary writ of injunction issue, restraining defendants from taking possession of plaintiff's property, or in any wise interfering with the possession thereof; "and from building or constructing or attempting to construct and build said viaduct and ap-

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proach over and upon plaintiff's property, and that upon final hearing, such injunction be made permanent; and for such other and further orders and relief as plaintiff may show itself entitled to, and for costs of suit."

Mr. JUSTICE GABBERT delivered the opinion of the court:

The complaint appears to be framed entirely upon the theory that the portion of the street in front of plaintiff's premises was vacated or abandoned; that for this reason the fee of the ground in front of its premises to the centre of the street reverted to it, and the approach is, therefore, being constructed upon its land, without provision having been made for compensating it for the value of the land taken, and resulting damages. This theory is not tenable. If the street was vacated as claimed, the purpose of so doing was to comply with the charter provision requiring the city authorities to provide for the vacation of the portion of the street over and along which the approach would be constructed. This, however, did not vest plaintiff with the fee of the street, as claimed, for the reason that, according to the express provision of the charter the fee of the street, nevertheless, remained in the city; so that it is evident property belonging to the plaintiff would not be taken by the construction of the approach. The erection of this structure may have so impaired its ingress and egress as to entitle it to compensation for the injuries thus occasioned, but this right does not entitle it to an injunction under the averments of its complaint restraining the construction of the approach until such compensation has been paid. This proposition is so well settled in this jurisdiction that further discussion of it is unnecessary. In brief, where the fee of an abutting lot owner is not sought to be taken, he cannot,

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under the constitution or under the statute of eminent domain, enjoin the construction of a viaduct or its approach on a street in front of his lot merely because the damages to his premises thus occasioned are not compensated in advance, provided the structure is being erected under proper legislative and municipal authority.—*Denver & S. F. R. Co. v. Domke,* 11 Colo. 247; *Denver, U. & P. Ry. Co. v. Barsloux,* 15 Colo. 290; *Haskell v. Denver Tramway Co.,* 23 Colo. 60.

As was said in the case last cited, the plaintiff has mistaken its remedy. The above cases, it is true, relate to the construction of railroad and street-car tracks, but the principal upon which they were decided is identical with the one applicable to the case at bar. The city has the unquestioned right to construct viaducts, or provide for their construction and approaches thereto. This is a lawful exercise of its authority which will not be interfered with by injunction, although property owners abutting a street upon which a viaduct or approach is constructed may have a right of action for damages.

The judgment of the district court is affirmed.

*Judgment affirmed...*

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

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[No. 7406.]

## CITY OF VICTOR v. SMILANICH.

1. WITNESS—*Competency—Infant*—Under Rev. Stat., Sec. 7273, not all children under ten years of age are made incompetent as witnesses, but only such as "appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." The question of the competency of the child is addressed to the sound discretion of the trial court, and its determination will not be disturbed unless it appears from the examination of the child on the *voir dire*, or from his testimony, that the court clearly abused its discretion. Where it appeared that a boy of six and a half years understood that he was required to tell the truth, and could be punished if he did not, that he had a fair understanding of the obligation of an oath, and of the facts which he detailed, *held*, that no abuse of discretion was committed in receiving his testimony.

2. EVIDENCE—*Testimony of Witness Indirectly Contradicted*—The positive testimony of a witness is not necessarily accepted as true, merely because not directly contradicted. The contradiction may be by circumstances, or by the testimony of another witness, inconsistent with that of the first. In such case the court or jury may exercise a judgment as to the probative effect of the evidence. Where such conflicting testimony appears upon the whole record to justify a well grounded inference by reasonable men, the question in dispute should be left to the jury.

*Appeal from Teller District Court.*—Hon. JOHN W. SHEAFOR, Judge.

Mr. EDWARD J. BOUGHTON and Mr. W. N. ALTER, for appellant.

Mr. J. E. FERGUSON and Mr. WM. MELLIN, for appellee.

Appellee, as plaintiff, by his next friend brought suit against the city of Victor to recover damages sustained by the alleged negligence of the latter. The trial resulted in a verdict and judgment in favor of plaintiff, in the sum of $7,500, from which the defendant has appealed.

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The complaint alleged, in substance, that plaintiff, at the time the injury was sustained, was about four and a half years of age; that at this time the city was engaged in extending its municipal water system by constructing a ditch through the residence district adjacent to the city, employing laborers for that purpose, who, with tools and explosives, were removing rock and soil from the ditch; that plaintiff resided with his parents in the vicinity of the ditch; that many other small children resided in the same neighborhood; that defendant's employes engaged in excavating the ditch, carelessly and negligently permitted a box of explosive caps, intended to explode with great force when struck with a hard instrument, to remain where the children of the neighborhood, including plaintiff, could gather them up; that these caps were of an attractive appearance, and enticing to plaintiff as play-things; that plaintiff and one of his play-mates, by the name of Willie Vranesich, not knowing the dangerous character of the caps, and having access thereto, took a number of the caps; that plaintiff held one of them in his hand, and Willie, not knowing the danger to which he and the plaintiff were exposed, struck the cap with a rock, causing it to explode, whereby plaintiff was grievously injured, in particulars specified.

For answer the defendant, so far as material to consider, denied the negligence charged; that is, denied that its employes negligently and carelessly left explosive caps where plaintiff and other children would have access to them.

The evidence established that plaintiff, at the time of his injury, was of the age charged in the complaint, and that his play-mate, Willie, was about six years of age; that Peter was injured by the explosion of a cap commonly used to explode giant powder, and that thereby his right hand was torn from his wrist, the bone in the thigh of his right leg broken, and his flesh and muscles badly lacerated. The evidence further establishes that defendant was engaged in excavating the trench for its water works system, and that in prosecuting this work,

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its employes used explosives, including caps of the character in question, for the purpose of exploding giant powder, and that such caps will explode when struck by a hard substance. It also appears that part of this work was being done by contractors, who had contracts from the city, and gratuitously by owners of property in the vicinity, all of whom used explosives, for whose conduct, however, the defendant was not responsible. The tools and explosives used by the employes of the city were kept in a shed near the residence of the parents of Peter, which was kept locked, the key being carried by one of them. Peter's mother testified that on the day her boy was injured, and shortly before the injury, she heard shooting in the trench. The employes of the city were engaged in working in the ditch at this time. These parties admitted that they kept explosives in the shed mentioned, which were used in excavating the ditch; that a few days prior to the time Peter was injured, they had brought to their work a round tin box about two-thirds full of caps. A full box contains 100 caps. There was testimony to the effect that other parties who had been engaged on the ditch, either as contractors or on their own account, had completed their work nearly a month previous to the injury, and that they had not left any caps on the work.

Willie was called as a witness for the plaintiff, and over the objection of the defendant, was permitted to testify. The objection urged was his age, which, at the time of the trial, was about six and a half years. On his *voir dire* he was examined by counsel for both sides, and by the court, by a line of questions intended to elicit his understanding of the obligations of an oath, and also his intelligence, after which the objection was overruled. From this examination it appears he had some idea of the obligation of an oath; that he understood he could be punished if he did not tell the truth; and that he was fairly intelligent for a boy of his age. He testified that he and Peter found the caps in a tin box just outside the door of the shed, where the tools and explosives were kept

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by the city's employes engaged on the ditch, and just prior to the time Peter was injured, and that Peter held one of the caps in his hand, which the witness struck with a rock. Shortly after the explosion about thirty-five caps were taken from Willie's pocket, which he said he found in the box at the door of the shed, and quite a number were found on the ground in the immediate vicinity of where the injury occurred. This witness further testified that he never got caps out of an empty house, nor from under the sidewalk, and that all the caps he ever got, he took from the box by the door of the shed. There was also testimony tending to prove that Willie could not have secured the caps about the residence of his parents, as explosives were not kept there. It appears that the employes of the city could not have used, in the prosecution of their work, but a few caps each day. One of the employes of the city testified that there were no caps in the shed on the day Peter was injured; that neither he nor his co-employe used any explosives on that day; and that he did not leave any caps lying around, or the box containing the caps, at the door of the shed; and that three days before he had taken the unused caps to his house. The testimony of the other employe was to the same effect.

At the conclusion of the testimony on the part of plaintiff, a motion for a directed verdict was interposed by the defendant, which was overruled. A similar motion was interposed by defendant at the time the testimony on both sides was concluded, which was, also, denied. After the verdict the defendant made a motion for a new trial, and also for a judgment *non obstante verdicto*, both of which were overruled.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The contention of counsel for the city is (1) that Willie should not have been permitted to testify; and (2) that the evidence is insufficient to sustain the verdict, because it fails to establish negligence of the city.

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Our statute, section 7273, R. S. 1908, provides that "children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," shall not be witnesses. This provision does not apply to all children under ten years of age, but only to those under that age who "appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." This language clearly implies that the competency of a child as a witness under the prescribed age, is a question addressed to the sound discretion of the trial court to determine. When, therefore, the trial court has determined this question, it will not be disturbed on review, unless it appears from the examination of the child on its *voir dire,* or its testimony, that the trial court clearly abused its discretion.—*State v. Blythe,* 58 Pac. (Utah) 1108; *People v. Swist,* 69 Pac. (Cal.) 223; *Wheeler v. United States,* 16 Sup. Ct. Rep. 93; *State v. Juneau,* 59 N. W. (Wis.) 580; *People v. Walker,* 71 N. W. (Mich.) 641.

From the record before us, it appears the boy understood that as a witness he was required to tell the truth; that he could be punished if he did not, and that he had a fair understanding of the obligation of an oath, and the facts, which he detailed; and hence, it does not appear the trial judge abused his discretion in permitting him to testify. The credibility of the boy as a witness and the weight to be given his testimony, considering his age, was for the jury to consider and determine.

The vital question of fact in the case was, whether the caps which the boys secured were left by the employes of the city at the door of the shed. Counsel for defendant insist this must be resolved in favor of the city, for the reason that the testimony of its employes, to the effect that they did not leave them there or at any place where the boys could have access to them, was not contradicted or impeached. The sufficiency of the evidence to justify the submission of the case to the

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jury was determined by the trial court contrary to the contention here, by overruling a motion of defendant for a directed verdict at the conclusion of the plaintiff's testimony, and by also overruling a similar motion when all the testimony was in. The jury resolved the fact in dispute in favor of the plaintiff, and the trial judge refused to disturb this finding by overruling a motion for a new trial, and a motion for a judgment *non obstante verdicto*.

There is testimony that the caps were found by the boys at the door of the shed in which the city's employes stored explosives used in excavating the ditch, and the jury must have found this to be the fact. The employes say they did not leave them there; and although this testimony is not directly controverted, the jury must have determined they did, and the trial judge has ruled that the evidence was sufficient to not only submit this question to the jury, but also sufficient to justify this finding of fact by them. It does not always follow that because positive testimony of a witness is not directly controverted that a jury must treat such evidence as true. A witness may be contradicted by circumstances, as well as by statements of others contrary to his own. In such cases neither courts nor juries are bound to refrain from exercising their own judgment as to the probative value of his testimony.—30 Ency. 1068. There is testimony that the caps were found by the boys in a box corresponding with the one which the employes admitted they purchased containing caps. The number of caps in this box, bearing in mind that thirty-five were found in Willie's pocket which he says he took out of the box, with the number found on the ground immediately after the explosion, tallies approximately with the number not used. There is testimony that the employes were using explosives the morning of the injury, although they deny it. The caps were found where they might have been placed, and inadvertently left, in unlocking and locking the door of the shed. There is evidence that all the explosives used by others in excavating the ditch had been removed about one month previous to Peter's injury.

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These are circumstances tending to contradict the positive testimony of the city's employes, for the reason that from the testimony, as a whole, they tend to prove that the caps the boys found belonged to the city, and that it was not altogether improbable they had been left (no doubt, inadvertently,) at the door of the shed by the employes of the city, as no one else would have been likely to leave them at that place. When circumstantial evidence is of a nature from which it can be reasonably inferred that it contradicts the direct and positive testimony of witnesses, it is the province of the jury to determine the weight to which such evidence is entitled.—*United States v. Pacific Express Co.*, 15 Fed. 867. In many instances evidence to establish a fact is circumstantial. If it is of sufficient strength and force, considering the surrounding circumstances and conditions, to justify a reasonable and well-grounded inference, by reasonable men, that the fact in dispute is thus established, the question should be left to the jury to determine.—*C. & F. Lumber Co. v. D. & R. G. R. R. Co.*, 17 Colo. App. 275; *Colo. Midland Ry. Co. v. Snider*, 38 Colo. 351.

Tested by these rules, we think the trial court was right in submitting the question of the alleged negligence of the employes of the city to the jury to determine; and that their finding on the subject is justified by sufficient substantial evidence to sustain it.

The judgment of the district court is affirmed.

*Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

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[No. 7512.]

## IN RE SMITH ET ALS.

CONTEMPT—*Application for Change of the Trial Judge*—In an application for a change of the trial judge the facts upon which the alleged bias of the judge then presiding is predicated, must be set out. This is not a contempt, unless it is established by evidence that such statement of facts was made with the reckless disregard of the truth, or with the intention to reflect upon the honor, integrity, and character of the judge.

A conviction of contempt in such case, without evidence, where the language of the application is not contemptuous *per se* is error.

*Error to Adams District Court.*—Hon. CHARLES MCCALL, Judge.

Mr. N. WALTER DIXON, attorney for respondents.

The purpose of this proceeding is to review a judgment of the district court adjudging Smith, Nordloh and Morris guilty of contempt. The history of the proceedings which culminated in this judgment, is substantially, as follows:

An action was pending in the district court of Adams county against a former judge of that county to recover a considerable sum which, it was alleged, he had collected and retained in excess of the fees allowed by law. Smith, as attorney for the Board of County Commissioners of Adams county, who had instituted this action, appeared before the judge of the district in which that county is located, and stated that the commissioners thought he was biased; that they did not want to file a formal application; that the friendly relations between the bench and bar required that a matter of this kind should first be suggested to the court, and the court, if possible, induced to act without a formal showing; that he, Smith, as attorney for the board, hoped he would be relieved of the necessity of making a formal showing, and that the re-

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quest for another judge to try the case to which reference has been made would be granted on the oral statement, that the board felt the judge was biased; that he understood that if the court required a motion to be filed, it would be necessary to set forth in detail the matters which gave rise in the minds of the commissioners to a belief of bias, which they did not want to do, unless required to make a formal showing. The judge declined to entertain the matter on suggestion, and stated that a formal showing would have to be made. Thereupon Smith, as counsel for the Board of County Commissioners, presented to the judge a motion for a change of venue in the case, which was verified by Nordloh and Morris, members of the board of county commissioners of Adams county. Smith had not disclosed the contents of this motion, nor the affidavit supporting it, to the attorneys for the defendant, and stated that if the judge would read the same, he believed it would recall to his mind a number of matters that, possibly, he had forgotten, and the court would grant the application for another judge, without counsel formally filing it. The judge declined to read the application, and ordered that a copy be served on the attorneys for defendant in the action mentioned, and stated that he would hear the application on a date then fixed. On this date the judge asked respondent Smith if he had any matters to present, when Smith stated he desired to urge the application for the calling in of another judge to try the case; that he supposed His Honor had read the motion, to which the judge stated, in substance, that he had not, and that if Smith had anything to present, he would have to present it in a formal way. The respondent then asked the judge to give him the motion, which had been in his possession since it was first presented, and thereupon read the application to the court, in a respectful manner. When he had finished reading the motion, the court promptly denied the application, and thereupon appointed Mr. Hilliard, an attorney, to prepare and file an affidavit, setting out all the facts in relation to the application for

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another judge, so that the court might, upon examination, determine if the application were contemptuous. Mr. Hilliard did so, and later filed an information and affidavit against the respondents for contempt. This information and affidavit contained a copy *haec verba* of the motion and affidavit, setting out in detail the matters upon which the board relied in support of its application for some judge other than the judge of the district to try the case against the county judge. We do not deem it necessary to set out this motion, and affidavit, in detail, it being sufficient to say that, in our opinion, it did not contain any matters, statements or charges which were contemptuous *per se*.

The information filed by Mr. Hilliard stated that the affidavit of the respondents to which we have referred was designed, intended, and calculated to incite public contempt for the court, and of the judge thereof, and for the purpose of leading the people to distrust the fairness and impartiality of the decisions of the court, and that, save and except certain matters, it was false, unwarranted, unfounded, and wickedly and maliciously intended to, and constituted, an attack upon the honor, integrity and purity of the court and judge thereof. Upon the filing of this information a citation was issued, requiring respondents to show cause why they should not be adjudged guilty of contempt.

At the time fixed in the citation the respondents appeared and filed two motions, one to quash the information and affidavit, and the other to quash the citation, both of which were overruled. Respondents then answered, wherein they set out, more in detail, the matters relied upon and stated in their affidavit in support of the application for another judge to try the case in which it was filed. This answer is quite long, and contains nothing which, in our opinion, would constitute contempt *per se*. In this answer the following appears:

"Your respondents respectfully show to the court further, in answer to the statement contained in the alleged affi-

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davit and information filed by Benjamin C. Hilliard, that said motion was not filed for any unworthy purpose whatever, nor for the purpose of intimidating or coercing the court or the judge thereof, in the decision of the suit wherein said motion was filed, nor was the same wickedly or maliciously filed, nor was it made, sworn to, or filed for the purpose of reflecting upon said court or judge, or bring it or him into contempt or disrepute, nor for any purpose other than, your respondents allege, properly and in accordance with the law and practice of the court, presenting honestly and in good faith facts necessary to be detailed in order to support their showing that, in their opinion, the judge of this court was biased in said cause."

They further stated that they believed the facts stated in their motion to be true, and believed the conclusion they drew therefrom, that the court was biased, was true, and justified by the facts within their knowledge.

It further contained a recitation of the steps taken by Mr. Smith in applying to the judge for another judge to try the case, as above set out. This answer was duly verified. Thereupon Mr. Hilliard, on the information filed by him, and the answer of respondents, moved that they be adjudged guilty of contempt and punished accordingly. This motion was sustained, and judgment rendered finding respondents guilty of contempt, and as a punishment, assessed a fine against each of them, and also that they be confined in the county jail at hard labor for periods ranging from five to fifteen days.

Mr. JUSTICE GABBERT delivered the opinion of the court:

It will be observed that the judgment of which plaintiffs in error complain is based entirely upon the pleadings. To properly present the application for another judge to try the case in which the application was filed, it was necessary, in order to comply with the decisions of this court, for counsel representing the members of the board of county commissioners to set out the facts in detail upon which the alleged prej-

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udice and bias of the judge of the district was predicated.—*Thomas v. People,* 14 Colo. 254. Doing so did not constitute a contempt *per se* when it appears, as we have stated, that the statements made in the affidavit supporting the application were not of a character which could be regarded as contemptuous,—*Mullin v. People,* 15 Colo. 437; so that these statements would not constitute a contempt unless it was established by evidence that they were made with a reckless disregard of the truth, or with the intention to reflect upon the honor, integrity and character of the judge. It was, therefore, necessary to inquire and ascertain the meaning and intention of the respondents in making the statements in the application upon which the proceedings were based.—*Thomas v. People, supra; Mullin v. People, supra.*

As preliminary to this procedure, the affidavit of Mr. Hilliard appended to the information charged that these statements in particulars were false, unwarranted and wickedly and maliciously intended to constitute an attack upon the honor and integrity of the court. Had evidence been presented establishing these allegations, the respondents might properly have been adjudged guilty. This procedure was not followed, as the judgment was based entirely upon the pleadings, consisting of the information, containing a copy of the statements made in the application, and the answer, the latter merely stating more in detail the facts related in the application filed by the respondents. This answer, in effect, denied that these statements were false, or wickedly or maliciously made, or intended as an attack upon the honor and integrity of the court. It appears, then, that there was no proof of the charge upon which the proceedings were based. Without such proof, the pleadings not containing any statements which were contemptuous *per se,* the court, in pronouncing judgment, acted without and beyond its jurisdiction.

The judgment of the district court is reversed and the cause remanded, with directions to overrule the motion for a

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judgment on the pleadings, and for further proceedings according to law. *Reversed and Remanded.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

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[No. 7516.]

## THE B. F. SALZER LUMBER COMPANY ET ALS. V. LINDENMEIER ET AL.

1. APPEARANCE—*Effect*—Objection to the return of process must be made *in limine*, by plea in abatement, or motion. An answer to the merits waives it.

2. MECHANIC'S LIEN—*Material Furnished But Not Actually Used*—Under sec. 4025 of the Revised Statutes, one who, acting in good faith, supplies material for the erection of a building at the instance of the principal contractor therefor, is entitled to a lien for the value of such material, even though some of such material went into another structure, and some was sold by the contractor.

3. ——*Material Furnished Without Any Specific Agreement*—As to the use to be made thereof, or to what building it is to be applied, gives no lien.

*Error to Larimer District Court.*—Hon. JAMES E. GARRIGUES, Judge.

Messrs. DOUD & FOWLER, for B. F. Salzer Lumber Company; Messrs. BENEDICT & PHELPS, for The Hallack & Howard Lumber Company; Mr. GEORGE S. REDD, for The Hinchman-Renton Fire Proofing Company, plaintiffs in error.

Mr. J. F. FARRAR, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

A number of lien claimants brought suit to foreclose their respective claims of mechanics' lien upon the premises owned by defendants in error, for materials alleged to have been fur-

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nished in the construction of a building thereon, known as the Opera House building in the city of Fort Collins. Among these several claimants were the plaintiffs in error. Each suit was a separate one and upon the trial all were consolidated and tried at the one hearing, as provided by statute. The lien claims in all cases were sustained with the exception of those of plaintiffs in error, each of which was denied by the trial court.

It appears that the defendants in error, entered into a contract with the defendant, The Cole-Potter Construction Company, a corporation, for the construction of such opera house building. The owners prior to the commencement of construction, filed for record a certain contract, but it is agreed that this was insufficient to protect the defendants under the statute in such case, and is therefore eliminated from consideration. It also appears that the Cole-Potter Construction Company, some time during the month of October, 1907, and before the completion of the building, abandoned the contract. The Cole-Potter Construction Company made no appearance in any of these cases.

The Hinchman-Renton Fire Proofing Company's claim was for certain metal lath furnished and used in the construction of the building, and of the value of $109.35. The only objection to the allowance of this claim urged and considered by the trial court, was the claim of the appellees that no service of summons in the cause was had upon the contractors, The Cole-Potter Construction Company. This service was questioned in the supplemental answer of appellees to the complaint of The Hinchman-Renton Fire Proofing Company, in which it was alleged that C. S. Potter, upon whom the personal service had been made as secretary of the Cole-Potter Construction Company, was not at the time of service of summons, either an officer, director, stock-holder or employee of such corporation and that said Potter at the time of the service of such summons, so stated to the officer making the service.

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The return of the sheriff is in every respect, regular on its face, showing personal service upon defendant company by personally serving C. S. Potter as its secretary.

It is not necessary, however, for us to consider the question of the impeachment of the return, for that is not a question that can be raised by the defendants in error in this case; and if it was, the objection was waived by them by first filing an answer, without objection to the sufficiency of the service upon The Cole-Potter Construction Company, and thus entering a general appearance in the cause. The question was attempted to be raised by a supplemental answer filed more than a year after the general appearance.

An objection to a return, whether made by motion to quash or by plea in abatement, must be taken *in limine*, for by appearing to the action and pleading to the merits, all such objections are waived.—18 Enc. P. & P. 975.

This being the sole question in the case, and for this reason, the judgment of the district court as to The Hinchman-Renton Fire Proofing Company, is reversed.

The claim of the applicant, The B. F. Salzer Lumber Company, was for two cars of lumber to be used as sheeting, and of the total value of $1,086.55. This was ordered by the Cole-Potter Construction Company, contractors, for use in the opera house building of defendants, and the two cars were delivered on July 28th, and August 19th, 1907, respectively. This material was delivered and placed upon a lot adjoining the grounds upon which the opera house was being constructed, permission to use such lot for the purpose having been secured for the construction company through one of the defendant owners.

There can be no question but that this sheeting lumber was sold by the lumber company to the construction company, for use specifically in the opera house building then being constructed. But it is contended that little or none of this lumber was used in the construction of such building, and that

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some of it was used in another building, then being constructed by The Cole-Potter Construction Company, and for other parties, known as the State Mercantile building, and that some of the lumber was sold by the construction company to other parties. It is also urged that the construction company ordered for use in the building, from the Salzer Company, more of this kind of lumber than was necessary for the purpose, and likewise ordered more from the Hallack and Howard Company, of the same kind of lumber than was used in the building.

These contentions of fact must be admitted, with the additional statement that the Salzer Company did not have knowledge that lumber for the same purpose was being furnished by the Hallack and Howard Company. It appears also that the business office of the Salzer Company was at Denver, and that the lumber was shipped from its yards at Frazer, Colorado.

It is insisted that under this state of facts, the lumber company was not entitled to its claim of lien. Sec. 4025, Rev. Stat. 1908, provides:

"Mechanics, material men * * furnishing materials to be used in the construction, alteration, addition to or repairs, whether in whole or in part, of any building * * * shall have a lien upon the property * * * for which they had furnished materials * * * whether at the instance of the owner or any other person acting by his authority or under him as agent, contractor or otherwise."

In the case of *Small v. Foley,* 8 Colo. 444, this court in construing a similar statute, said:

"One of Foley and Leonard's assignors was The Holmes Hardware Company. It appears that of the hardware furnished by them for the houses, after it had been delivered at the proper places, $35.00 worth was removed by Mr. Rankin to another house and was not actually used in these houses. So far as appears, this material was removed by Rankin without the knowledge of the hardware company.

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Counsel say it was error to include this amount in the decree. The statute gives to any person who, by contract with the owner, shall furnish any material for the construction of any building, a lien upon the building, and the land it occupies. He is not required to see that it actually goes into the building. If, by contract, he furnishes it for the building, whether it is used there or not, he is entitled to the lien. This is what the statute says, and we cannot by construction distort his language into something else."

This doctrine was reaffirmed as applicable to the present statute in *Rice v. Cassells,* 48 Colo. 73. This was a case where the contractors had purchased for use in a building certain, brick, which had been delivered on the ground near and convenient for such use. The contractors failed before the completion of the structure, and gave a chattel mortgage on the unused brick to a third party. In an action of replevin by the mortgagee against the owners of the building, it was held that the action could not be maintained. The court said:

"The reason for the rule is, that in such circumstances the material man is entitled to a lien upon the structure for the construction of which the materials are sold and delivered; and for the protection of the owner of the building under course of construction, a qualified title to such material is vested in him. Of course, it will be understood that in stating the above rule it is limited to the facts of this case, Crawford, who sold the brick to Mowrey and Klein, did so in good faith, and upon the credit of the building, for the reason that he sold them with the express understanding that they were to be used in the construction of that part of a building which the contractors had agreed to construct for the lodge. The brick were actually placed upon the ground in the immediate vicinity of the building, and part of them used in its construction. It would certainly be unjust to compel the lodge to discharge a lien which Crawford might have asserted for the brick furnished, of which it never had the benefit, and at the

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same time it would be equally unjust to defeat the right of the material man to a lien for the brick furnished by holding that because they had not been wrought into the structure, no lien attached."

There is nothing in this case tending to show other than a good faith sale by The Salzer Company to the contractors, and that the material so sold was for use in the opera house building and delivered on the grounds in the city of Fort Collins, used for the storage of materials to be used in such building.

The claim of lien should have been sustained. The judgment of the lower court as to The Salzer Lumber Company, is reversed.

In the case of the claim of The Hallack and Howard Lumber Company, it does not appear that the lumber was sold and furnished for the particular building, but rather that the company simply knew that The Cole-Potter Construction Company was at the time engaged in the construction of both the opera house, upon which the lien is claimed, and the State Mercantile building. Neither does it appear that there was an agreement that the material so furnished was to be used in either of such buildings.

The Hallack and Howard Lumber Company filed a claim of lien upon both buildings, but afterwards abandoned the one on the State Mercantile building. The secretary of the company testified that he did not know in which of these buildings the material had been used until his visit to Fort Collins, after the completion of the building. So that from the testimony it does not appear that there was any contract between The Hallack and Howard Company and the construction company, that the lumber so sold should be used in the opera house building, which would seem necessary to sustain a lien upon that property. Before a lien may attach it must appear that the materials were expressly furnished and delivered for use in constructing a specified building.—*Rice v. Cassels, supra.*

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The judgment of the district court denying the claim of lien to The Hallack and Howard Lumber Company is affirmed.

The case is remanded with direction to the district court to enter judgment in accordance with the views herein expressed.

CHIEF JUSTICE MUSSER and Mr. JUSTICE BAILEY concur.

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[No. 7564.]

## EMPIRE STATE SURETY COMPANY V. LINDENMEIER ET AL.

1. EVIDENCE—*Lost Writings—Evidence of Loss*—The law does not require direct and positive proof of the loss or destruction of a document, but only such evidence as will raise a reasonable inference of such loss or destruction. Action upon a bond to secure performance of a contract for the construction of a house, according to the plans and specifications of an architect named. The contract provided that the specifications were and should remain the property of the architect. The architect testified that he had made very careful search for them, entirely without success. *Held*, that the loss of the specifications was satisfactorily excused, and the contract, without the specifications, was held properly received in evidence.

But the court note that the action was not founded upon any departure from the plans or specifications, and that the cause could as well be determined without them as if they had never existed.

2. INTEREST—*Exceeding Liability of Surety*—The later authorities, and the preponderance of authority, is to the effect that in an action against the surety for performance of an executory contract, interest may be allowed, even though the effect is to exceed the penalty of the bond. The allowance is made, however, not as part of the debt, but as damages for its detention.

But where the surety has no knowledge of the default a demand must be made, and interest is allowed only from the time of such demand.

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3. DEMAND—*Institution of Suit*, is a sufficient demand. Interest from that date, only, is allowed where the creditor is entitled to interest only upon demand, and no demand is shown.

4. SURETY COMPANY—*Character Of—Contracts How Construed*—The doctrine that a surety is a favorite of the law, and that a claim asserted against him is *strictissimi juris* has no application to a bond, executed upon consideration, by a corporation organized to execute such bonds for a profit. Such a corporation is in effect an insurer; its contracts are, as a rule, in terms prescribed by the corporation itself, and should be construed most strongly in favor of the obligee.

5. ——*Contract for Erection of Building—Surety Liable for Liens*—The contractor for the erection of a building agreed to "furnish all materials and do all the work," etc. Defendant became surety for such contractor. *Held*, that defendant was liable for the amount of a lien established against the building for material furnished the contractor, though the owner had not discharged such liens.

*Error to Larimer District Court.*—Hon. NEIL F. GRAHAM, Judge.

Messrs. MURRAY & INGERSOLL, for plaintiff in error.

Mr. J. F. FARRAR, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

The defendants in error on the 11th day of May, 1907, and who were at that time the owners of certain lots and buildings in the city of Fort Collins, entered into a written contract with The Cole-Potter Construction Company, a corporation, for the construction of a theater building on the said premises. Under the contract the construction company was to provide all the materials and perform all the work to be performed under the contract, and specified therein. The work and material were to be in accord with the plans and specifications of the architect, E. H. Moorman, named in the agreement, and which plans and specifications were declared to be a part of the contract. But it was expressly agreed:

"It is further understood and agreed by the parties hereto, that any and all drawings and specifications prepared for the purpose of this contract by the said architect are and remain his property, and that all charges for the use of the same, and

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for the services of said architect, are to be paid by the said owner."

The contract price was fixed at the sum of $10,125.00, and the work performed and materials furnished were to be under the direction of the architect who was to furnish monthly estimates, and the owners were to deduct and retain fifteen per cent. of these until the building was completed.

As a condition of the signing of the contract, a bond in the sum of $5,000.00 was required and such bond was furnished by the construction company, with the plaintiff in error as surety. The present suit is based upon such bond, and judgment was rendered in favor of the defendants in error, in a sum equal to the penalty of the bond, $5,000.00 with interest in the sum of $703.35, the same being computed from the date of the foreclosure of certain mechanics' liens upon the property, which in amounts aggregated a total in excess of the present judgment.

It appears that the construction company defaulted in its contract before the completion of the building, and also that it had not paid for certain materials furnished for use in the building, resulting in the filing and foreclosure of the liens above referred to.

The only errors complained of and discussed in the briefs, and which we are therefore justified in considering, are (a) the admission of oral testimony upon the hearing concerning the plans and specifications referred to in the original contract, the original and no copy of which could be produced at the trial, (b) error of the court in the allowance of the $703.35, interest, and (c) the rendition of judgment without proof of the payment of the lien judgments.

In regard to the first contention, it will be noticed that the plans and specifications were under the contract, to be and remain the property of the architect. It seems also, that no copy of these were recorded with or as a part of the con-

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tract, and also that the original nor a copy was attached to the contract. The architect testifies concerning the disposition and loss of the plans and specifications as follows:

"I did have the original plans and specifications of that building, but I can't find them. I made a search for them very carefully. Q. Who had these plans and specifications? A. The original drawings are always found on file or supposed to be on file, in the architect's office. There were several sets of blue prints made and they were brought to Collins and left on the work. The Cole-Potter Company had one or two sets, and both of the owners had a set. Q. You are unable to find any set of these plans and specifications? A. No copy, not even a blue print. Q. You can find nothing? A. Not a thing. No claim was ever made upon me by The Cole-Potter Construction Company for any extension of time upon the contract. If I remember correctly, this work should have been completed by The Cole-Potter Construction Company under the terms of the contract, September 14, 1907."

W. E. Aiken, one of the plaintiffs, testifies as follows:

"I am one of the plaintiffs on this action. I haven't a set of the plans and specifications for the erection of the Orpheum Theatre as prepared by Moorman, architect. I have made a search for them. I do not know where there is a set. I don't know of one being in existence at this time. I had a set. Mr. Moorman delivered it to me. Q. What did you do with your set? Did you give them to anybody? A. No, sir. I think The Cole-Potter Construction Company had them to use some of the time. I don't know where it is now. I have made an examination for the purpose of finding them and could not."

William Lindenmeier, Jr., another of the plaintiffs, testified concerning the matter in the following language:

"I conducted the business for myself and my father, so far as we were concerned in this matter. We had a set of plans and specifications between us. One set between us. I

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don't know where that set is now. It is not in my father's possession.

Q. How do you know it is not in your possession? A. At the time this lien case came up we searched every place, around the store, and around home, and could not find it. I don't know whether there is a set in existence at this time. I don't know what became of our set. Q. Did you give them to anybody? A. I couldn't say where they are, but the probabilities are that The Cole-Potter Construction Company had them."

Cole, president of the construction company, conducted the business for it and he left the country when he abandoned the contract about October 12th, 1907, and his whereabouts was unknown.

It is contended that the plans and specifications were by the terms of the agreement made a part of it, and that the bond was conditioned upon the performance of the contract as a whole, and therefore the plans and specifications must be proved with the same degree of strictness as those parts of the contract and the bond, which are material to the determination of the cause.

There does not appear to have ever been any question between the owners of the property and the construction company, involving the plans and specifications as such, and neither is there any dispute or contention between the parties to this suit in that regard.

In fact, the appellants introduced no testimony upon the trial of this cause at all except a letter between counsel, but for what purpose it does not appear, as it seems to be wholly foreign to any question involved.

Counsel cite many authorities in support of their contention, but these are not applicable here. The rule of this court in this respect seems to be:

"That a particular instrument existed, is the most material inquiry; the fact of its existence and the contents of it are matters to be tried by the jury; the loss of it must be made out

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to the satisfaction of the court. The law exacts nothing unreasonable in such a case. If parol proof of the loss establishes the fact with reasonable certainty, that is sufficient. No precise rule can be safely laid down upon this subject, further than this, that diligent search and inquiry should be made of those places or persons in whose custody the law presumes the instrument to be."—*Hobson v. Porter,* 2 Colo. 28; *Londoner v. Stewart,* 3 Colo. 47; *Hetson v. Davenport,* 4 Colo. 169.

The law does not, however, require direct and positive evidence of the loss or destruction of the document, but requires only such evidence as will raise a reasonable inference of loss or destruction.—17 Cyc. 543.

But there is no contention here that loss by reason of the contractors default, was occasioned by failure in any respect upon the part of the contractors, to comply with the plans and specifications, but only because the building was not completed within the time agreed in the contract otherwise provided, and because of failure to pay for the materials furnished, as therein agreed. Beside, in the first paragraph of the contract it is provided:

"This does not include any work or material in front of entrance of foyer, as shown on the drawings and described in the specifications prepared by E. H. Moorman, architect, which drawings and specifications are identified by the signatures of the parties hereto, and become hereby a part of this contract."

This identification by the signatures of the parties, when taken in connection with the testimony of the architect above recited, would clearly indicate that the plans and specifications were not to attach to the contract, though to be construed as a part of it, but were to remain with and as the property of the architect. Indeed, no copies appear to have been made except blue prints unidentified, and for use in construction. and therefore the architect was in fact the only person who ever had possession or charge of them and his testimony as to loss of such plans seems to be satisfactory.

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While it appears that the owners subsequently entered into another contract for the improvement of certain store buildings in front of the opera house, yet the testimony is clear and not disputed that no claim is made in this suit for loss occurring by reason, or on account of such subsequent contract, or in the making of such improvements. Indeed the testimony referred to as being improperly admitted, refers only in an inferential way to the plans and specifications, and the cause could be as well determined, if there never had been any specific plans and specifications. There was no error in the admission of the contract exclusive of the plans and specifications referred to therein.

The next question raised by the appellant is that it was error to allow interest to the plaintiffs, thereby making the total amount of recovery in excess of the penalty of the bond which was $5,000.00. The damage sustained by the plaintiffs by reason of the default of the contractors, as appears from the testimony, including the amount of the judgments for material furnished by the material men, and after making all proper deductions, was in excess of the amount of the judgment in this case, including the interest allowed. This judgment was for $5,000.00 so limited by the penal sum of the bond, and $703.35 additional as interest from the date of the lien judgments to the time of the rendition of judgment.

The question of interest in such cases, is one concerning which there has been much confiict of authority. It is a general rule, and well settled, that sureties are liable only to the extent of the penalty of the bond. But the later and apparently preponderance of authority in this country, is to the effect that interest may be allowed from the time of the default, even though this may make the judgment in excess of the penalty named in the bond, not, however, as a part of the debt for which he originally became responsible, but as damages for its detention.

It was said in *Bank of Brighton v. Smith,* 90 Am. Dec. 144 (Mass.): "There is a plain distinction to be observed be-

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tween cases in which interest is given by way of damages, and those in which it constitutes a part of the debt, as it does in contracts in which there is a promise to pay interest. As a general rule, in all cases in which a debtor is in default for not paying money in pursuance of his contract, he is liable for interest thereon from the day of his default, and when a demand is necessary to put the debtor in fault, interest is to be given only from the demand."

In *Goff v. United States,* 22 App. cases Dist. Columbia 536, the court quoting from a former opinion by that court said:

"We think it may be stated as the general rule of the common law of our country, different, it is true, from the former rule in England prior to the statute of 3 and 4 William IV., chap. 42, but perfectly well settled with us, 'that if a debt ought to be paid at a particular time, and is not then paid, through the default of the debtor, compensation in damages equal to the value of the money, which is the legal interest upon it, shall be paid during such time as the party is in default,' sec. 1, American Leading Cases, 1616, where the cases upon the subject are collated and discussed. And this rule has received the approval of the supreme court of the United States.—*Loudon v. Taxing District,* 104 U. S. 771, 26 L. Ed. 923; *Chicago v. Tebbetts,* 104 U. S. 120, 26 L. ed. 655; *Young v. Godbe,* 15 Wall. 562, 21 L. Ed. 250; *Curtis v. Innerarity,* 6 How. 146, 12 L. Ed. 380. It is true that in order to be allowed, it should be claimed in the declaration; but when it is so claimed there can be no doubt of the right of a plaintiff, upon a proper showing, to recover interest as well as principal."

This doctrine was asserted in the case of *Taswell v. Saunders,* 13 Grattan (Va.) 354, wherein the court entered upon an extensive review of the authorities at that time, both American and English. See also 32 Cyc. 122 and authorities cited.

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But it seems from these authorities that interest must be claimed by the pleadings and that it may be computed only from the time of the demand in case demand may be necessary, and not from the time of the default. Demand in this case would appear to be necessary, for it is not a case where the surety would be likely to know of the default in the absence of notice of that fact.

In the complaint in this action, there is an allegation that demand has been made and refused and which is admitted by the answer, but the date of such demand is not alleged and there is no proof upon that point. The authorities seem to agree that the institution of the suit is a sufficient demand, and interest has accordingly been computed from that date. Therefore, in the absence of an allegation or proof of demand prior to the commencement of the suit in this case, the court should have allowed interest only from that date, August 23rd, 1910.

It is contended by appellant that no judgment may be rendered in favor of the plaintiff in this case, other than for a nominal sum, for the reason that the plaintiff had not at the time of trial paid the judgments and discharged the liens theretofore established. The defendant is a surety company engaged in the business of furnishing surety bonds, and must be considered in the light of the rule of construction as to strictness in such cases, differing from that of individual sureties.

"Generally speaking, a contract of suretyship by a surety company is governed by the same rules as the contracts of other sureties, but some distinctions are made by the courts in construing such contracts. The doctrine that a surety is a favorite of the law, and that a claim against his is *strictissimi juris,* does not apply where the bond or undertaking is executed upon a consideration, by a corporation organized to make such bonds or undertakings for profit. While such corporations may call themselves 'surety companies,' their business is in all essential particulars that of insurers. Their con-

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tracts are usually in the terms prescribed by themselves, and should be construed most strongly in favor of the obligee."—32 Cyc. 306. An investigation of the authorities cited by the author, will disclose that this text is a fair statement of the modern rule.

Counsel for appellant cite no case which seems to sustain their contention except that of *Henry v. Hand,* 36 Ore. 492, though there are others sustaining this view. But this contention is not sustained by the weight of authority, neither does it appear to be supported by sound reason or justice. These authorities were extensively reviewed and the doctrine rejected in the case of *Stoddard v. Hibbler,* 156 Mich. 335, and in which it was well said:

"The reasoning of these cases does not commend itself to the court. In view of the statute of this state, which entitles laborers and materialmen to liens, it seems to us a most narrow construction to say that, when the contractor agrees to furnish all labor and material necessary to build and complete a house, he may comply with this requirement by simply placing the material on the ground, engaging the labor, and leaving the owner to pay for it, or to permit a lien to stand against his property. This is not furnishing the material in any substantial way, and we find that other courts have taken a very different view from that expressed in the cases referred to."

That court cited as sustaining the view there held, the case of *Kiewit v. Carter,* 25 Neb. 460, wherein it was said:

"The plaintiff in error contends that the bond given by him and others does not provide for mechanics' liens; that he is a mere surety, and is not bound beyond the strict terms of the bond. The second paragraph of the contract provides that Kough is 'to furnish all the material, such as lumber, hardware, brick, lime, sand, paint, oils, etc., as may be necessary to complete said house according to the plans and specifications.' If Kough failed to pay for such materials therefor, and the plaintiff below, was required to pay the same, Kough

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paid for these articles, no mechanics' lien would have been filed. The lien is not a cause, but a consequence, flowing from the non-payment of the materials. In other words, it is merely a mode of enforcing payment for materials used in the erection of a building."

Also the case of *Closson v. Billman,* 161 Ind. 610, wherein it was held:

"When we look to the contract, however, it is plainly provided that he is to furnish the lumber, and the provision concerning the payment of $250 on presentation of receipted bills for materials furnished and delivered upon the lot, makes it clear that it was contemplated that said Worley should pay for the materials he was to furnish. The bond provides that Worley is to build, construct, and complete the residence 'according to his contract,' and it was as much his duty to deliver the house free of liens on account of materials as it was to use materials which belonged to him. To hold, in the face of the bond and contract, that the construction and completion of the building in accordance with the plans and specifications was a compliance with the bond, although the owner would be compelled to pay out large sums in excess of the amount stipulated in the contract to discharge liens for the purchase price of materials, would be to keep the word of promise to the ear, but break it to the hope."

In *Hayes v. Lane,* 116 Ky. 566, the court took the same view and it was there declared by the court:

"Under the contract the sureties bound themselves that Lane would furnish the material and build the church 'in strict accordance with the terms and conditions of said contract,' * * *. The sureties guaranteed that Lane would furnish the material and erect the building. In the erection of the building, Lane had to perform the labor himself, or to employ some one to do it. It follows that the sureties guaranteed that the necessary materials and labor would be furnished to erect the building. But it is urged on behalf of the sureties that the terms of their bond were complied with when

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the material and labor were furnished; that their contract did not require them to protect the church against the cost of the material and labor. Reduced to the last analysis, their claim is that Lane complied with his contract by furnishing the material and labor, although the church was compelled to pay for such part for which Lane failed to pay. Lane did not comply with his contract when he furnished the material and labor, unless he paid for it, or released the building from liability therefor."

The conclusion we have reached is quite well stated in *Friend v. Rolston,* 35 Wash. 422, where the court said:

"The learned counsel for appellant cites numerous authorities with reference to the non-liability of sureties on bonds or covenants of indemnity 'to save and keep harmless the obligee from certain outstanding debts, or that the party indemnified shall not sustain damage incurred through the omissions or acts of the principal, etc., until the obligee shall have paid or discharged such debts, or may have otherwise sustained financial loss.—*Miller v. Fries,* 66 N. J. L. 377, 49 Atl. 674. But there is a marked distinction between covenants of that description and agreements that the obligors shall perform specific acts.—*Litchfield v. Cowley,* 34 Wash. 566, 76 Pac. 81; *Wright v. Whiting,* 40 Barb. 235. The covenant in the building contract on the part of the contractors with Mrs. Friend is, as between them, equivalent to a direct promise to pay for materials used in the construction of the building, and a breach of the contract occurred when the contractor suffered the obligation to become a charge on her property; at least, she was entitled to treat it as a breach. It may be true that she was not obligated to do so; that she could have waited until the lien had become fixed and determined by judgment against her property, and treated that as the breach of the bond, thus escaping the onus of establishing, at the trial, the validity of such lien and the amount of the indebtedness, but she was not obliged to delay action in that behalf. She could treat the failure of the contractors to keep her property free from such

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incumbrance as a breach of the contract. Therefore, the position of appellant's counsel that this action was prematurely brought is untenable."

The contract in the case at bar provided that:

"Article I. The contractor shall and will provide all the materials and perform all the work for the concrete, stonework, brick-work, plastering, carpenter work, tin and galvanized iron work, cement work, iron work, roofing and exterior cementing of stage building."

The bond provided that: "The conditions of the above obligation is such: That whereas The Cole-Potter Construction Company has this day entered into an agreement with W. E. Aiken, William Lindenmeier, and William Lindenmeier, Jr., to furnish the materials and labor and construct a theater building on property to be designated in the city of Fort Collins, Colorado, in accordance with certain plans and specifications furnished by F. H. Moorman, architect, for the sum of ten thousand, one hundred and twenty-five dollars ($10,125.00), and whereas the said The Cole-Potter Construction Company has agreed to furnish all of said materials and to do all the work in the construction of said building in accordance with said plans and specifications which are referred to and made a part hereof, as though fully and at length set out herein.

Now, therefore, if the said The Cole-Potter Construction Company shall well and truly keep and perform each and every of the covenants and agreements in said contract contained on its part to be kept and performed, then this obligation to be null and void; otherwise to remain in full force and effect."

It was as much the obligation of the contractors and their surety under this agreement and bond, that the materials should be paid for as that they should be furnished. In fact the value of these materials was clearly included within the consideration named in the contract, the performance of which the bond was given to secure. The contractors failed to make

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these payments, liens were claimed, established and foreclosed and the property of the plaintiffs ordered to be sold in payment of the judgments so rendered.

The bond was security for these payments and it would be nothing short of manifest injustice to hold that the plaintiffs must have paid these judgments before they can maintain action on the bond. Their property had been decreed to be sold in payment of the sums so secured by the bond.

The district court is instructed to so modify the judgment as to compute interest on the amount of the penalty on the bond from the day of the institution of the suit, and as so modified, the judgment is affirmed.

*Modified and affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 7634.]

## UNIVERSITY OF COLORADO v. WILSON ET AL.

1. WILLS—*Construction*—Courts are bound to give to a will such a construction as will carry out the plain intention of the testator.

2. ——*Construed*—The testator bequeathed $50,000 for the erection and maintenance of a home for poor widows and orphans, but upon a condition precedent impossible in law to be performed, following this bequest with the direction that "otherwise the said $50,000 to revert back, and be divided" among certain legatees named. *Held*, that the manifest intention of the testator was that if, for any reason, the conditions prescribed in the provision made for the home, should not, or could not, be performed the gift over to the legatees should immediately take effect. An order making distribution accordingly, affirmed.

*Error to Boulder County Court.*—Hon. E. J. INGRAM, Judge.

Hon. BENJAMIN GRIFFITH, attorney general, Mr. CHARLES O'CONNOR, assistant attorney general, and Mr. JOHN A. GORDON, of counsel, for plaintiff in error.

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Mr. HENRY O. ANDREW and Mr. FRANK L. MOORHEAD, for defendants in error.

Mr. JUSTICE BAILEY delivered the opinion of the court:

The matter to be determined is, what does paragraph seven of the will of the late Andrew J. Macky mean, and what is its effect.

After making a number of specific money bequests to relatives and friends, the testator undertook, in that paragraph, to make a charitable gift for an hospital building and home for poor widows and orphans, as follows:

"7th. I further give and bequeath to and for a hospital building and a home to be built in Boulder, county of Boulder, and state of Colorado, for the comfort of poor widows and orphan children, while sick and unable to care for themselves, the sum of fifty thousand ($50,000) dollars. Providing the city of Boulder, by its officers, or the county commissioners and their successors in office, will support and maintain the same, otherwise the said $50,000 to revert back and the same to be divided up among the following legatees; to-wit, Lydia A. Snow, Jerome Macky, Alonzo Macky, Chauncey Macky, Celia B. Dickerson, Anna C. Walker, Mary Aldrich and Emma Aldrich, Cora Doyle, George Robbins, Elmer Robbins, Earl Harold Robbins, Lola Robbins and Monabelle Robbins in proportion as their legacies herein mentioned bears to the said ($50,000) fifty thousand dollars."

The city of Boulder declined to accept the gift, but the Board of County Commissioners offered to do so upon the condition imposed, and asked that the individual members of the board be appointed trustees of the legacy for the purpose set forth in the bequest. In the case of *Robbins v. County Commissioners*, 50 Colo. 610, this court held the primary gift to charity void, for the reason that "its vesting is made to depend upon an impossible, legally unenforceable condition precedent;" whereupon the executor of the estate, joined by certain of the legatees named in that paragraph as legatees

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over of said $50,000.00, filed in the county court their petition asking for an order of distribution according to the terms of the bequest. To this petition the Board of Regents of the Colorado State University, as residuary legatee, interposed objection and filed a petition asking for a construction of paragraph seven, claiming the fund of $50,000.00 under the residuary provision of the will. The county court held the gift over to Lydia A. Snow and others valid, and ordered a distribution of the $50,000.00 accordingly. The regents bring the case here on error, seeking a reversal of the judgment of the county court.

The primary gift being out of the way, the question is, does the gift over take effect and is it to be enforced? It is a settled rule that the intention of the testator must govern, when such intention is made clear by the terms of the will itself. This has been repeatedly declared by our own and other courts to be the guide in all matters involving construction of wills. Courts are bound to give such construction to a will as will carry out and put into effect the plain intention of the testator.—*Bacon v. Nichols,* 47 Colo. 31; 40 Cyc. 1386, and cases cited.

The first gift contained in the paragraph of the will under consideration depended, as has already been determined by this court, upon a condition precedent, impossible of legal enforcement. In deciding the case of *Robbins v. County Commissioners, supra,* this court did not directly pass upon the question involved in this case, and the statement in that case as to the nature of the condition upon which the primary gift depended does not necessarily determine the status of the gift over. It having been adjudged that the primary gift is void, it now remains to determine the meaning and effect of the words in paragraph seven of the will following the attempted gift to the city of Boulder or to Boulder county. The condition precedent which was by this court held impossible of enforcement reads: "Providing the city of Boulder, by its officers, or the county commissioners and their successors in of-

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fice, will support and maintain the same" (the hospital building and home). Following this proviso comes the clause which is now before the court for consideration, to-wit: "Otherwise the said $50,000.00 to revert back and the same to be divided up among the following legatees," Lydia A. Snow and others. The testator did not say that the gift to the county should take effect on condition that the county expressed a willingness to accept the gift, but imposed as a condition precedent to the vesting of the gift that the county should permanently support and maintain the hospital and home. That such was the intention of the testator, and that such is the meaning of the proviso, is made clear by the language of the court, in *Robbins v. County Commissioners, supra,* where this is said:

"When Mr. Macky said that the $50,000, which he undoubtedly intended should be used in building a hospital and home, should revert back and be distributed among certain legatees, if the county commissioners and their successors would not furnish the necessary support and maintenance, he undoubtedly meant thereby to postpone the vesting of his gift until Boulder county, through appropriate action by its board of commissioners, became legally bound to do so. Mr. Macky did not intend to make provision for some mere temporary thing. His purpose was to provide a hospital and home for all time to come for those who were entitled to enjoy its privileges. It is not the building, for whose erection the money was given, but 'the said $50,000' itself, that is to revert and be so distributed if the required support was not forthcoming."

The clause in the will which provides that the county commissioners "will support and maintain the same," means provided they shall, or do, support and maintain it. It in no sense implies that a mere willingness on the part of the board to do so is sufficient. It requires that this support be absolutely and unconditionally provided for and furnished, else the condition is not met. And if for any reason, because the law interposed an obstacle against providing such support and

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maintenance, or for any other reason, such support was not forthcoming, then the condition upon which the primary gift rests was not fulfilled and the gift failed. Attaching this meaning to the condition precedent then, we look to the provision of the will itself in this behalf to determine the status of the gift over. By this paragraph of the will Mr. Macky said, in effect, if the city of Boulder, or if the Board of County Commissioners of Boulder county, will not, do not or can not, furnish maintenance and support for the proposed charitable institution, then the gift of $50,000.00, primarily intended for that charity, shall be divided among those certain other legatees in the will, specifically named in this paragraph. Language could scarcely make it plainer that the testator intended this money to go to erect a charitable home for poor widows and orphans, who under the terms of the will were entitled to such privilege, if either Boulder city or the county of Boulder could and would permanently support and maintain it; if not, then to the other legatees named. It is manifest that the plain intention of the testator was that the gift over should take effect if, for any reason, the city of Boulder, or the Board of County Commissioners of Boulder county, should fail to provide for the permanent support and maintenance of the hospital and home, and there being no legal objection to be urged against such gift, it ought, upon every consideration, to be given full effect.

Since by the language of the will itself the intention of the testator respecting this fund is clear, and under well settled principles of law such intention must control in the disposition thereof, as the gift over contravenes no established rule of law or public policy, the various other matters, so ably presented by opposing counsel, upon the question of conditional limitation and kindred subjects, and the rules of law applicable thereto, need not be considered. Neither is it necessary to determine what the status of the residuary legatee would be, had both gifts been held void, as it is clear, under

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the construction here given to paragraph seven of the will, that such legatee has no claim upon or interest in the fund in question. *Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE WHITE concur.

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[No. 7642.]

DENVER, BOULDER & WESTERN RAILROAD CO. v. MCDONOUGH.

**APPEALS—*Verdict on Sufficient, Though Conflicting Evidence,* will not be disturbed.**

*Error to Boulder County Court.*—Hon. E. J. INGRAM, Judge.

Mr. E. E. WHITTED, Mr. R. H. WIDDICOMBE and Mr. J. M. CATES, for plaintiff in error.

Mr. O. A. JOHNSON, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action to review a judgment of the county court of Boulder county, wherein the defendant in error recovered the sum of $200 for the loss of two colts, by reason of the alleged negligence of the plaintiff in error. The cause was first tried before a justice of the peace and afterward and upon appeal, by the county court. There are no pleadings in the case and in so far as the abstract discloses, no instructions, and none are discussed in the brief, although counsel assigns as error, that the verdict is contrary to the instructions.

It appears that plaintiff's colts were traveling in an easterly direction and on the tracks of defendant, near the village of Sunset, in Boulder county. Both colts were on a trestle or bridge, upon which the tracks were laid. One of the animals was at the time apparently entangled, by its legs having dropped through spaces between the ties on the trestle. It is not clear whether the other one jumped or was struck by the

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engine of defendant's train, but it was found on the ground below the trestle, the tracks upon which were from ten to twelve feet above the surface. Its back was broken and there were other injuries so that it became necessary to kill it. The animal on the trestle was crushed and it would seem, instantly killed.

The bridge or trestle was sixty-four feet long and straight, but located in what is termed a left-hand curve, looking toward the west. The creek bank on the right side of the track looking westward, would appear from the testimony to be anywhere from ten to thirty feet high.

The record is very hazy as to just where on the trestle the animals were when the accident occurred. The train was moving up grade and westward. The engineer was the only eye witness to the accident and testifies in substance: That the first intimation he had that there was anything ahead of him on bridge No. 31, was after the engine had rounded the curve and straightened up so he could see ahead, at which time his engine was on the east end of the bridge; that he saw some object, but could not tell whether it was a dog, man or what it was, whereupon he set the emergency brake; the train was moving at a speed of between 15 and 18 miles per hour. It took him probably two or three seconds to put the emergency brake in operation. He did not reverse the engine because he did not have time; he was looking straight ahead but was unable to see the bridge until the pilot was on the east end of the bridge on account of the sand box and smoke stack which are in the way; that you have to wait until the engine straightens around, and that you cannot see all of the bridge at any time when going west, for the reason that the engine is in the way, the line of vision being obstructed by the head of the boiler and steam dome; that he can't see over the top of the boiler; that he can only see straight out in front.

The fireman testifies that he was shoveling coal at the time, and had been so engaged for about two minutes.

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On the part of the plaintiff, several witnesses testifying from measurements, say that there is a clear vision from a point east and on the outer rail for a distance of one hundred and seventy feet from where the animal, or animals, were said to have been struck by the engine. This distance, it will be observed, would be much greater on the fireman's side of the engine. The engineer says that the train was stopped within from fifty-four to sixty feet after applying the emergency brakes.

The contention of appellant is that there was no proof of negligence, and that the court erred in refusing to direct a verdict for the defendant.

It will be seen that the testimony is conflicting in that the engineer testifies that he did not and could not see the animals in time to prevent the accident, while the testimony on the part of plaintiff tends to show that by the exercise of care and diligence, he could have seen the animal in time to have prevented the collision.

This latter contention would appear quite well established if the fireman is to be considered as the company's representative in this respect.

The case of *R. G. W. R. R. Co. v. Boyd,* 44 Colo. 122, presents a similar case of conflicting testimony, and it was there held to be a question for the jury.

Upon the authority of that case the judgment is affirmed.

*En banc.*

Mr. JUSTICE GARRIGUES dissenting.

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[No. 7694.]

## NORCROSS v. CUNNINGHAM.

**ESTOPPEL—*By Record*—Action for deceit in the sale and conveyance of certain lands, and a water right for the irrigation thereof. The complaint alleged misrepresentation as to the character and value of the water right. In a former action against the defendant plaintiff, at first, made the same charge of fraud, but afterwards, with full knowledge of the facts, abandoned such charge, and so amended his**

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**complaint as to assert that the conveyance in question was effective, not only as to the water right therein described, but also conveyed, as an appurtenance to the land, another water right theretofore vested in defendant, and in the trial of such former cause, plaintiff had in open court, declared by his counsel that he made no claim that he had been defrauded in the transaction which culminated in such conveyance. *Held*, that he was estopped to renew the charge of fraud.**

*Error to Larimer District Court.*—Hon. HARRY P. GAMBLE, Judge.

Messrs. RHODES & FARNWORTH, for plaintiff in error.

Mr. FRED W. STOW and Mr. HOMER S. STEPHENS, for defendant in error.

Mr. JUSTICE HILL delivered the opinion of the court:

Upon motion judgment on the pleadings was granted in favor of the defendant. The plaintiff's complaint alleges in substance, that in May, 1906, he purchased from the defendant a farm situate under the Hillsborough canal, from which it requires water for its irrigation; that he paid $10,000 for the land and water to be conveyed therewith; that as a part of the consideration the defendant represented that there would be conveyed in the same warranty deed, and in connection with the land, 125 inches of water in this canal; that this water was and would be a water right to said land for the entire irrigation season of each year; that it was of the earliest water appropriated from the Big Thompson river, the stream from which the canal received its supply; that certain crops which could be raised and which made the farm especially desirable and very valuable, required late irrigation, and that the water rights which would be conveyed would furnish water during the late irrigation season to raise such crops; that relying upon defendant's representations with reference to the water to be conveyed and that was conveyed, he purchased said land and water, and in May, 1906, received from defendant a warranty deed, which deed conveyed the land and 125 inches of water in one instrument; that upon receipt of the deed he entered into possession, began, and has ever since continued, to cultivate the

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farm; that after plaintiff took possession, defendant claimed that the water conveyed in connection with and for the irrigation of this land was simply a right to take water from this canal by reason of a contract entered into between the owner of the canal and other persons, which contract, through sundry conveyances, had been conveyed to defendant, and that the defendant had only conveyed by his deed to plaintiff what was known as this water contract.

The plaintiff further alleges, that the canal company was under no obligations to furnish water under this contract, except when there was water in the canal derived from the Big Thompson river under an appropriation known as priority No. 25, being of a late date; that he has been unable, under and by reason of the water conveyed to him by said deed, to obtain any water from this canal for the irrigation of this land, except in the early portion of each irrigation season, up to about July 1st; that after the first of July said water right so conveyed furnishes no water for said lands; that this condition has prevailed ever since the purchase, and that it will so continue hereafter, except an intermittent amount during the early portion of the irrigation season; that by reason of these facts he cannot raise any crops upon the lands, except early crops; that the land without a water right furnishing water during the entire irrigation season, but only for the early portion, is of no value in excess of $5,000; that plaintiff has been injured, damaged and defrauded by the defendant through his false and fraudulent representations, etc., in the sum of $5,000, for which amount judgment is prayed.

In his answer the defendant, among other things, alleges, that subsequent to the sale and in March, 1909, with full knowledge of all facts, the plaintiff instituted a suit, etc., against the defendant by which he sought to have this deed for the land and the 125 inches of water decreed to convey as an appurtenance under the deed and to the land and as annexed to the land, a certain other 1.75 cubic feet of water which was a part of the canal's Big Thompson priority No. 1; that in

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the same suit the plaintiff also sought to recover damages alleged to have resulted to him by reason of the alleged false and fraudulent representations made at the time of the sale, pertaining to the water rights, and upon account of his failure to procure the same; that, at the time of the commencement of the other suit, the plaintiff had full knowledge of all facts relative to his rights, etc.; that at the time there were two remedies open to him for the enforcement of his alleged claims arising out of the purchase of this land and water, which were, by claiming that he had received by this deed the 1.75 cubic feet of water above referred to, and having it so decreed by the court, or, that he had not received the water which he should have received by the deed, and recover damages against the defendant for failure to convey it; that these remedies are inconsistent, in that by the first, his claim is based upon the fact that he had received the water, while the latter is based upon the fact that he did not receive the water; that both of said remedies were adopted and sought to be enforced by the plaintiff in the former suit, and were so alleged in his complaint; that during the pendency of this suit the plaintiff elected to base his claim upon the fact that he had received said water by said deed; that his complaint was amended accordingly; that he thereafter abandoned his claim made therein, based upon the fact that he had not received the water, and made no claim for damages in the action upon account of such failure on the part of the defendant to convey the said water, as contained in his original complaint; that the suit now instituted is upon the same transaction and based upon the same claim as that portion of plaintiff's former suit, which related to damages; that the facts and circumstances as set forth in plaintiff's former suit in that portion which was by him abandoned by his election, as aforesaid, are the same as here; that by reason of said election he is now barred from claiming any damages or relief in this suit; that having claimed in the former suit that he had, by the deed, received the water, he is now estopped from claiming damages by rea-

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son of the failure on the part of the defendant to convey the same.

As a further defense it is alleged that during the progress of the former trial, the plaintiff's counsel, with his consent, acquiescence and ratification, and in his presence, and in open court, stated that the plaintiff did not claim that any fraud had been committed upon him in the transaction, for which reason that he is estopped from claiming damages in this suit against the defendant upon account of any alleged false and fraudulent representation on the part of the defendant.

The plaintiff, by replication, sets forth, that in June, 1908, he brought suit against the ditch company and the defendant to compel them to recognize him (by virtue of the provisions of his deed from the defendant) as the owner of the 1.75 cubic feet of early water theretofore owned by the defendant, he states that this suit was decided against him. He admits that in March, 1909, he brought the suit against the defendant as alleged in the answer, in which he sought to have the deed conveying the land and 125 inches of water decreed to convey therewith as an appurtenance under the deed and to the land the 1.75 cubic feet of water, which was a part of the earlier priority. He also admits that this suit was decided against him, but denies that in either there was tried or determined the question of damages involved in this action.

It will be observed that the plaintiff has not denied, that in his second suit brought against the defendant he also sought to recover damages growing out of the same transaction, and that during its pendency he elected to proceed under that portion of his complaint by which, if he was successful, it would secure for him the water which he claimed he had purchased. The great weight of authority in which we concur is to the effect that the two remedies are inconsistent.—15 Cyc. 257; *Bales v. Williamson,* 128 Iowa 127; 7 Ency. of Pl. and Pr. 360; *Bracken v. Atlantic Trust Co.,* 167 N. Y. App. 510; *Sickman v. Abernathy,* 14 Colo. 174; *Wheeler v. Dunn,* 13 Colo. 428; *Bank of Santa Fe v. Board of Com'rs.,* 60 Pac.

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(Kan.) 1062; *Jones v. Longhorne,* 19 Colo. 206; *Campbell v. Kauffmann Milling Co.,* 42 Fla. 328; *Carroll v. Fethers et al.,* 102 Wis. 436; *McWilliams v. Thomas et al.,* 74 S. W. (Tex.) 596; *Taussig et al. v. Hart,* 49 N. Y. App. 301; *Lowenstein & Bros. v. Glass et al.,* 48 La. Ann. 1422; *Ermeling v. Gibson Canning Co.,* 105 Ill. App. 196; *Salyers v. Smith,* 67 Ark. 526; *Ogden v. Moore,* 95 Mich. 290; *Remington Paper Co. v. Hudson,* 67 Pac. (Kan.) 636; *James v. Parsons, Rich & Co.,* 78 Pac. (Kan.) 438; *Elevator Co. v. U. P. Ry. Co.,* 97 Iowa 719; *Conrow et al. v. Little et al.,* 115 N. Y. App. 387.

In the former action the defendant (with knowledge of all the facts) having elected as to which of two inconsistent remedies he would pursue, we are of opinion that he is bound by such election. For this reason the motion for judgment upon the pleadings was properly sustained. See *Anthony v. Slayden et al.,* 27 Colo. 144, and cases therein cited.

The judgment is affirmed. *Affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GABBERT concur.

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[No. 7749.]

## HORN v. THE CLARK HARDWARE COMPANY ET AL.

1. MECHANIC'S LIEN—*Applies to a Leasehold in Land*—One furnishing material for the improvement of real property by contract with one having a mere leasehold, is, under the statute (Rev. Stat., Sec. 4027) entitled to a lien upon such leasehold estate.

2. ——*Right of Tenant to Remove Fixtures*—An agreement between the landlord and tenant that the latter may remove the structures which he erects, or the improvements which he places upon the demised premises, has no effect to change the character of such structures, as against third persons.

The tenant had purchased from the lien claimant a boiler, engine, and other machinery and appliances, and erected the same in a building situated upon the leasehold. His intention was that the whole should constitute, and be operated as, a mill for the treatment and reduction of ore. The machinery and appliances were necessary to accomplish this purpose. *Held,* that they thereby became part of the leasehold and were not, as against the lien claimant, liable to be sold as personalty on execution against the tenant.

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3. ——*Decree—In Part for Things Not Lienable*—A decree awarding a lien, in part for things not the subject of a lien under the statute, fails only to the extent of those matters as to which the allowance is improper.

4. ——*Parties*—Where the lien is asserted only against the leasehold interest of the tenant, his landlord is not, under sec. 4035, Rev. Stat., a necessary party.

*Error to Gilpin District Court.*—Hon. CHAS. MCCALL, Judge.

Messrs. GILLETTE & CLARK, for plaintiff in error.

Mr. JAMES M. SERIGHT and Mr. WM. C. FULLERTON, for defendants in error.

Mr. JUSTICE GABBERT delivered the opinion of the court:

The Pewabic Consolidated Mines Company owned a stone structure known as the "old freight depot," located on mill-site No. 39, adjoining Blackhawk, in Gilpin county. It was without a floor, ceiling, roof, partitions, doors or windows. This building and the ground upon which it was located, was leased to the plaintiff in error for the period of ten years. By this lease Mr. Horn was granted (quoting from the lease) "the privilege of fitting up the said old freight depot with any and all machinery necessary for the concentration of tailings from North Clear Creek, and for working any and all ores by the methods usually adopted by plants for the reduction of the precious metals; and further granting unto the said party of the second part the privilege of diverting and using all the water from North Clear Creek necessary to operate said machinery; and further granting unto the said party of the second part the right, upon the surrender, termination, or forfeiture of this lease, to remove all machinery, furniture, and fixtures placed upon said premises by the said party of the second part."

This lease, with the consent of the lessor, was assigned to The Denver Mining & Reduction Company, which we shall refer to in the course of the opinion as the lessee. The latter

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fitted up the structure so as to afford proper shelter and housing for the machinery of a mud-mill, by putting on a roof and equipping it with doors and windows. The company then installed in the building the necessary tables and other machinery and equipment for a mud-mill. After the mill had been in operation for a time, the mine upon which it depended for tailings shut down, and the mill was idle for several months. A little later the company decided to convert it into a custom mill by the addition of such other machinery as might be necessary. Of the new machinery required to make this change, a portion was supplied by The Denver Mining & Reduction Company, purchased in Denver, and a portion by the defendants in error, Stroehle & Sons. The machinery was placed in position by the latter, the reduction company furnishing a part of the labor. The engine with which the mud-mill had been equipped was taken out, and a new one furnished by the company placed in the building on a concrete foundation sunk in the ground. A new boiler furnished by Stroehle & Sons was placed in the building, set in its own four walls of brick, open in front. In addition to the boiler, Stroehle & Sons furnished other material and equipment in the way of lumber, screens, jigs, shafting, belting, and other fittings used in constructing the mill. The company also owned or furnished, as part equipment of the mill, a number of appliances used in operating it, and also a number of appliances necessary to use in connection with operating the machinery, and a lot of lubricating oil, also used for this purpose. The only portion of the machinery that came in contact with the building was the shafting. It was laid upon stringers, or girders, and extended across the building. The shafting ran in boxes, or journals, bolted to the stringers. The power generated in the building was communicated to this shafting, which, in turn, by belts and pulleys operated the machinery. There is testimony to the effect that all the machinery could be removed without materially injuring the building.

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In fitting up the mill, the company purchased material from the defendant in error, The Clark Hardware Company, consisting of tools, brasses, nails, and other materials which were used in the construction and operation of the mill. In July, 1911, the plaintiff in error recovered a personal judgment against The Denver Mining & Reduction Company. A few days later the sheriff of Gilpin county, under an execution issued on this judgment, levied upon and took into his possession, as the personal property of the judgment debtor, the tables, engines and other equipment of the mill, which was a part and parcel of it, as installed in the building; and also some tools and supplies, and advertised the same for sale as personal property. Prior to the date fixed for the sale of this property under execution, the defendants in error, joining as plaintiffs, brought suit against The Denver Mining & Reduction Company, the plaintiff in error, and the sheriff of Gilpin county, the purpose of which was to foreclose a mechanic's lien upon the mill, including the structure and the machinery and equipment therein, which embraces the property levied upon by the sheriff under the execution issued on the plaintiff in error's judgment, and to restrain the latter and the sheriff from selling this property under the execution by virtue of which it had been levied upon. A temporary injunction was issued, restraining the execution sale. The trial of the case resulted in a judgment, making the temporary injunction perpetual, and adjudging the plaintiffs entitled to liens upon the property levied upon by the sheriff, the building in which it was situated, the land upon which the building stands, and decreed that all this property should be sold in satisfaction of the liens so established. To review this judgment, Horn, the judgment creditor, has brought the case here on error.

The first point urged by counsel for plaintiff in error to consider, is, that under the present statute of Colorado a lien will not lie against a leasehold interest in real estate. Section 4027, R. S. 1908, provides, *inter alia*, that "Any lien provided

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for by this act * * * shall extend to any assignable, transferable or conveyable interest of such owner, or reputed owner, in the land upon which such building, structure, or other improvement shall be erected or placed." The act of 1889, Session Laws of that year, 247, provided that "except when otherwise indicated, any person having an assignable, transferable, or conveyable interest or claim in or to any land, building, structure, or other property mentioned in this act, shall be deemed an owner."

This provision was considered in the case of *Carey Hardware Co. v. McCarty,* 10 Colo. App. 200, where it was held that by virtue thereof, a mechanic's lien attached to a leasehold interest in real estate. The purpose of the provisions of the act of 1889 and our present act, was and is the same, namely, to give to those entitled to a lien the right to subject the owner's interest in real estate to such lien. The lien which attaches is not limited to an estate in fee, but extends to any interest of the person that is transferable, assignable, or conveyable in the real estate at whose instance and upon which a building, structure, or improvement is erected. For the purposes of the act, such person is deemed the owner. If he owns the fee, the lien is upon the fee. If he owns a lease estate, the lien attaches to that interest.—*Ombony v. Jones,* 19 N. Y. 234; *Badger Lumber Co. v. Malone,* 54 Pac. (Kan.) 692; *Hathaway v. Davis,* 32 Kan. 693; *Williams v. Vanderbilt,* 145 Ill. 238.

That it was not the purpose of the act of 1899 to limit the right to a lien to an estate in fee, is manifest from the fact that it expressly provides a lien shall attach to whatever interest the person has in the land at whose instance the building, or structure, or other improvement was erected or placed thereon, for which the lien is claimed; and further provides that "Any lien provided for by this act shall extend to and embrace any additional or greater interest in any of such property acquired by such owner at any time subsequent to the

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making of the contract, or the commencement of the work upon such structure, and before the establishment of such lien by process of law." Sec. 4027, supra. Clearly, these provisions were wholly unnecessary if, as contended by counsel for plaintiff in error, a lien could only be asserted against an estate in fee. The evident purpose of these provisions is that a mechanic's lien shall operate upon the estate, whatever it may be, which the person employing labor and procuring materials for the construction of an improvement has in the land upon which such improvement is placed before the lien is established by a decree of court. We think the lease-hold interest of The Denver Mining & Reduction Company could be subjected to a lien under our present lien act. To hold otherwise, would be directly contrary to the terms of this act.

The next proposition urged on behalf of plaintiff in error is, that the plant of machinery in the mill was trade fixtures, and therefore, personal property against which a mechanic's lien would not lie, and hence, subject to be levied upon under the execution issued on the judgment obtained by plaintiff in error. In support of this proposition, it is contended that The Denver Mining & Reduction Company was merely a tenant, and had the right to remove the machinery on the expiration or forfeiture of its lease. This question is not really material in determining whether or not the lien claimed by the plaintiffs attached to the machinery. In other words, what the rights of the lessee may be, with respect to removing the machinery, as against the lessor, is of no particular moment in ascertaining the rights of the lien claimants. The lessor and lessee might agree between themselves that the machinery could be removed by the latter when the lease expired, or was forfeited, or by reason of the relation between them, it might be that, independent of any agreement, the machinery could be removed by the lessee on the happening of either of these events, and that, as between them, the machinery, in determining their rights, would not be regarded as a fixture or part of the realty, but their private agreement, or their respective

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rights in the machinery by operation of law, would not change the character of this property, so far as the rights of third persons were concerned, who claimed a lien thereon, as realty.—*Mollie Gibson C. M. & M. Co. v. McNichols,* 51 Colo. 54; *Dobschuetz v. Holliday,* 82 Ill. 371; *Hathaway v. Davis, supra.*

The vital question, then, is whether or not, as between the lien claimants and the lessee, the machinery in the building was a part of the lease-hold interest of the latter. In determining this question the test is whether the lessee placed the machinery in the building and attached it either to that structure, or the ground therein, in whole or in part, with the intention that it should become a part of a plant intended, as a whole, to constitute a mill or reduction works, the purpose of which was to extract the values from tailings and crude ores. If that was the object, and its use was necessary or essential for the successful operation of the mill for the purposes designed, then the machinery so placed became a part of the lease-hold interest of the lessee.—*Mollie Gibson C. M. & M. Co. v. McNichols, supra; Carey Hardware Co. v. McCarty, supra.*

That such was the purpose of the lessee, that the machinery was necessary and essential to accomplish the object for which it was installed, and that each article was a component part of the whole, the evidence establishes beyond question. The engine and boiler were attached to the ground within the building. The motive power generated by these fixtures was communicated to shafting attached to the building, which, in turn, operated other machinery therein. All these appliances were reasonably necessary and essential to effect the purpose for which they were placed in the building, and were, therefore, a part of the lease-hold interest of the lessee. Had The Denver Mining & Machinery Company been the owner of the fee of mill-site No. 39, and as such owner, had placed the machinery in the building in the same manner and for the same purpose it did, as lessee, it would hardly be contended that

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such machinery could be levied upon under execution as personal property, either as affecting its rights or the rights of others having a prior lien upon the building in which it was placed. In such circumstances the machinery would admittedly be a fixture. In the case at bar the situation and rights of the parties are no different from what they would be in the supposed case, for the obvious reason that the question of whether the machinery was or was not a fixture must be determined by the same rule in each case. We have determined that a lease-hold estate may be the subject of a lien, and logically, it must follow that whatever is a fixture of that estate canbe subjected to the same lien. That such is the purpose of the act is made clear by a consideration of another portion of section 4027, *supra*, whereby it is provided: "The liens granted by this act shall extend to and cover so much of the land whereon such building, structure, or improvement shall be made as shall be necessary for the convenient use and occupation of such building, structure, or improvement, * * * and shall attach to all machinery and other fixtures used in connection with any such lands, buildings, mills, structures, or improvements." Suppose the lessee should sell its lease-hold interest without any reservation; the machinery with which the mill is equipped would pass to the purchaser without being specially mentioned, or if it should sell the mill with a clause conveying its appurtenances and fixtures, such machinery would have been conveyed to the vendee; or suppose The Denver Mining & Reduction Company had seen fit to raise the question that its mill could not be dismantled by the execution creditor levying upon and removing the machinery therein as personal property, for the reason that such machinery was a part of its estate in the premises, would it not be held, without question, that it was not personal property? Counsel for plaintiff in error cite cases which, seemingly, sustain his contention; but an examination of these cases discloses that they are distinguishable from the one at bar, either because of the facts or for the reason that the lien acts are different from ours.

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Counsel concedes that if the machinery had been made a part of the realty, and our statute provided for a lien against a lease-hold interest, it might, as a part of the realty, be included in a general lien against such realty. We think our statute, as a whole, beyond question, does provide for a lien against a lease-hold interest, and in determining to what such lien attaches, the rule is no different from what it would be if the lien was asserted against an estate in fee.

It is also contended the evidence discloses that some of the articles for which liens were claimed and allowed were not lienable, and that, therefore, the liens must fall. This is not tenable. To the extent that articles not lienable, if any, were furnished the lessee, liens should not have been allowed; but this would not defeat the entire liens of the respective claimants, as in such circumstances they would be entitled to a decree awarding them liens for the value of such articles furnished by them as were lienable. If liens were allowed for the value of articles not lienable, the judgment (if the record justified it) might be modified; but no error is assigned which raises this question, and hence it is not presented for consideration.

The final question urged is, that the liens must fail because the owner of the property—that is, The Pewabic Consolidated Gold Mines Company—was not made a party. This contention is based upon section 4035, R. S. 1908, which provides that "The owner or owners of the property to which such lien shall have attached, and all other parties claiming of record any right, title, interest or equity therein, whose title or interests are to be charged with or affected by such lien, shall be made parties to the action." The owner meant by this section is the person upon whose interest in the property the lien is claimed, and sought to be established. No claim was made by claimants as against the interest of The Pewabic Company. The liens asserted and sought to be established by claimants were limited to the interest of the lessee, and it was,

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therefore, the owner of the property, as contemplated by the section of the statute above quoted.

The judgment of the district court is affirmed.

*Judgment affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE HILL concur.

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[No. 7809.]

## WOLFE V. ABBOTT ET AL.

1. EVIDENCE—*Judicial Notice*—A municipal ordinance is not judicially noticed but must be established by proof.

2. MUNICIPAL CORPORATIONS—*Power to Abate Nuisances*—Paragraph 45 of sec. 6525 of the Revised Statutes is not self-executing. The power granted must be exercised through an ordinance. The power granted by paragraph 53 of the same section, to prohibit "within one mile beyond the outer limits of the town any unwholesome or offensive business," has no application to places for the keeping or sale of intoxicating liquors, but only to such things as are offensive, or unwholesome within the ordinary use of the term, e. g., slaughter houses, pig-sties, feeding places, and the like; and even conceding the application of the provision to places kept for the sale of intoxicating liquors, it confers no power to declare such establishments beyond the limits of the town a nuisance.

3. ——*Manner of Exercising the Power*—The procedure for enforcing an ordinance prohibiting the sale of intoxicating liquors should be regulated by ordinance. If such establishments are declared a nuisance one charged with the offense should be prosecuted and tried on the specific accusation of maintaining a nuisance. The manner of effecting the abatement should be prescribed, and the order of abatement should conform to the ordinance, and the manner of proceeding should not be left to the discretion of the officer.

4. MUNICIPAL ORDINANCE—*Prosecution—Conviction of Offense Not Charged*—Charge of "selling and keeping liquor for sale." Conviction of "maintaining a nuisance," a fine imposed, and abatement of the nuisance ordered. The conviction is void.

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5. ——*Publication*—The statute (Rev. Stat., sec. 6673), provides that all by-laws of a town imposing a fine, etc., shall be published in a manner specified, and "shall not be in force until the expiration of five days after they have been so published." An ordinance declaring the keeping for sale of any intoxicating liquors a nuisance, and that the same "may be abated as any other nuisance." The provision quoted was never published. *Held*, that such provision never became of force, and a judgment convicting the accused party of maintaining a nuisance, and directing the abatement of such nuisance, is no justification for acts done pursuant thereto.

*Error to Washington District Court.*—Hon. H. P. BURKE, Judge.

Messrs. ALLEN & WEBSTER, for plaintiff in error.

No appearance for defendants in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. The complaint alleges that June 26, 1908, defendants unlawfully, wilfully, maliciously and forcibly entered plaintiff's residence, about half a mile from the town of Akron, Colorado, when he was away, and his wife and child were at home, and took therefrom and destroyed eight barrels of beer and one barrel of whiskey, and greatly frightened and made ill and sick his wife and child, to his damage, etc.

Defendants pleaded in justification that plaintiff Wolfe was tried and convicted before the police magistrate for maintaining a nuisance, by storing and keeping for sale at his residence, within one mile beyond the outer boundaries of the town, intoxicating liquors, in violation of a town ordinance, which nuisance, upon his conviction, the police magistrate ordered abated; that pursuant to the order, defendant Abbott as marshal, and the other defendants, excepting Mitchell, as acting marshals of the town, abated the nuisance by seizing, removing and destroying the liquor. The district court after hearing the evidence dismissed plaintiff's suit and he brings the case here on error.

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2. On the afternoon of June 26, 1908, plaintiff Wolfe was tried and convicted in the police magistrate's court of the town of Akron. Immediately thereafter defendants, except Mitchell, went to his residence about half a mile beyond the town limits, when he was absent, entered the house, and against the protests of his wife, seized and took from the house and destroyed four or five barrels of beer and a part of a barrel of whiskey. This suit by Wolfe is to recover damages for the alleged trespass.

3. One person has no right to enter and search another's home, and seize, carry away and destroy his property without proceeding according to the law of the land.—*Canon City v. Manning*, 43 Colo. 144-151.

Defendants attempted to justify their conduct under an ordinance, which they say plaintiff was duly convicted of violating. The district court could take no judicial notice of the town ordinances. Defendants were obliged to introduce the ordinance upon which they relied, in evidence. It was admitted over plaintiff's objection, and is as follows:

"Ordinance No. 74."

"An ordinance concerning the sale of intoxicating liquors."

"Sec. 11. It shall be unlawful for any person to sell, barter, exchange, offer, keep or store for the purpose of selling, or to give away, offer to give away, or to keep or store for the purpose of giving away, in any building within the corporate limits of the town of Akron or within one mile of the outer boundaries of said town, any intoxicating, malt, vinous, mixed or fermented liquors; and the sale, storing, bartering, exchanging, offering or keeping for sale or keeping or storing for the purpose of giving away any such liquors within any building as aforesaid, is hereby declared to be a nuisance, *and may be abated as any other nuisance.* * * * Any person violating the provisions of this section shall be deemed guilty of an offense, and upon conviction thereof shall be fined in a sum not less than $100 nor more than $200 for each offense."

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"Sec. 14. Whereas in the opinion of the board of trustees, an emergency exists requiring that this ordinance take effect and go in (force) from and after its passage."

To prove plaintiff was convicted of violating this ordinance, defendants introduced the journal or written docket entries of the trial, kept by the police magistrate, as follows:

"State of Colorado,
ss.
County of Washington,
Town of Akron.

The Town of Akron,
*Plaintiff,*
v.
Willis Wolfe,
*Defendant.*

In the police court within and for the town aforesaid, before T. D. Mitchell, police magistrate.

June 23, 1908. Complaint made and filed by John F. Dole, charging the violation of ordinance 74. Selling liquor and keeping liquor for sale, in Akron, Colorado, and within one mile thereof, and warrant issued for the arrest.

June 25. Case set for June 26, at 9 o'clock A. M.

June 26. Court convened and case continued till 1 o'clock P. M. * * * Trial had and defendant found guilty of maintaining a nuisance in the City Drug Store in Akron, Colorado, and fine assessed at $200 and costs of suit, and nuisance ordered abated. Defendant found guilty of maintaining a nuisance within one mile of city limits, and in the Yeamans house or ranch. Fine assessed at $200 and costs of suit and nuisance ordered abated as per order to the town marshal, and defendant committed to the town jail until fine and costs are paid."

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4. We do not know whether the complaint upon which plaintiff was tried and convicted, and the alleged order abating the nuisance, given by the magistrate upon which it is claimed defendants acted, were in fact introduced in evidence or not. They are not in the record, or bill of exceptions, which recites that it contains all the evidence. The police magistrate's court was a court of inferior jurisdiction, and its record had to recite the facts necessary to confer jurisdiction. There being no copy of the complaint here, we can only determine the nature of the charge by the docket entries. This record kept by the magistrate, discloses no lawful authority or justification for the conduct of the defendants in entering plaintiff's residence against his will, seizing, removing and destroying his property. The magistrate's docket shows that Wolfe was charged with, and tried for selling and keeping for sale in the town, and within one mile beyond the outer boundaries thereof, intoxicating liquor in violation of ordinance 74; that he was convicted of maintaining a nuisance at two different places, at his city drug store in town, and at his residence beyond the town limits; that he was fined $200 for each offense, and each nuisance ordered abated. He was not charged with or tried for maintaining a nuisance, hence there could be no judgment finding him guilty of that offense. He was charged with selling and keeping liquor for sale in violation of the ordinance. There was no complaint or trial for keeping a nuisance, and the order of abatement, if one was given, was illegitimate. One cannot be convicted, fined under a town ordinance for maintaining a nuisance, imprisoned to collect the fine, and his property seized and destroyed to abate the nuisance, without due process of law.—*Houston v. Walton,* 23 Colo. App. 282.

5. Section 6673, Rev. Stats. 1908, provides:

"All ordinances shall, as soon as may be after their passage, be recorded in a book kept for that purpose, * * * and all by-laws of a general or permanent nature, and those

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imposing any fine, penalty or forfeiture, shall be published in some newspaper published within the limits of the corporation, * * * and it shall be deemed a sufficient defense to any suit or prosecution for such fine, penalty or forfeiture, to show that no such publication was made; * * * such by-laws and ordinances shall not take effect and be in force until the expiration of five days after they have been so published."

One of the issues in the district court was, that the ordinance had not been published, and it was admitted on the trial that the italicized portion, "And may be abated as any other nuisance," was not published. This ordinance was in force as published. The unpublished portion never took effect, hence, the omitted part could constitute no justification.—*Union Pacific Co. v. Montgomery,* 49 Nebr. 429; *Union Pacific Co. v. McNally,* 54 Nebr. 112; *O'Hara v. Town of Park River,* 1 N. D. 279; *Kneib v. People,* 50 How. Prac. 140; *Herman v. City of Oconto,* 100 Wis. 391; *Carpenter v. Yeaton Borough,* 208 Pa. 396; *Nat. Bank v. Town,* 48 Fed. 278.

6. Section 6525, paragraph 45, R. S., 1908, relating to the powers of towns, provides, they shall have power "To declare what shall be a nuisance, and to abate the same, and to impose fines on parties who may create, continue or suffer a nuisance to exist."

It is claimed this statute gave power to the town to declare what should constitute a nuisance, and to abate it without any ordinance; therefore the clause omitted from the printed ordinance was immaterial because the town had that power anyway, under the statute, without the ordinance. This statute is not self-executing. It grants the power; but it must be exercised through an ordinance.

7. Assuming, under paragraph 45, the town had power to declare it a nuisance for one to sell or keep for sale intoxicating liquor inside the corporate limits, and, by ordinance regulating the procedure, to abate the nuisance, this does not confer power to declare what shall constitute a nuisance within a mile beyond the outer boundaries, and abate it. Towns

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possess such powers as are granted them. We are not unmindful of the fact that paragraph 18 of the section confers powers upon towns by ordinance to prohibit the selling or giving away of intoxicating liquor within one mile beyond the outer boundaries; but the manner of enforcing the prohibition is through an ordinance imposing a fine.

Paragraph 53 provides they shall have power to prohibit within or within one mile beyond the outer boundaries of the town, any offensive or unwholesome business or establishment, and to prohibit the carrying on of any business or establishment in an offensive or unwholesome manner within one mile beyond the outer boundaries of the town. This statute does not apply to liquor, and if it did, there is no power given to declare the enumerated matters a nuisance with power to abate the same. The town must prohibit the things mentioned, and enforce the prohibition by fine and imprisonment. The power by ordinance to prohibit and abate a nuisance within a mile beyond the outer boundaries of towns is not conferred by this paragraph. Besides, it must be evident to any comprehensive mind, that paragraph 53 was intended to apply to those things which are offensive to the senses, or unwholesome in the sense in which the terms are ordinarily used. They refer to such things as dead carcasses, offensive and unwholesome slaughter houses, privy vaults, pig sties, feeding pens and the like.

8. The mere sale of or keeping for sale, intoxicating liquors, is not a nuisance *per se;* but the town council had power to declare it a nuisance by ordinance.—*Houston v. Walton,* 23 Colo. App. 282.

This power did not authorize the police magistrate, when Wolfe was tried and convicted before him on a charge of selling liquor contrary to the ordinance, to summarily declare him guilty of maintaining a nuisance and order the marshal to abate it. The procedure should be regulated by an ordinance, and the manner of abatement not left to the discretion of the officer executing the order. The ordinance provides that this

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nuisance shall be abated as any other nuisance, which means in a lawful manner. The ordinance after declaring what should be a nuisance, should have provided the manner of abating it, and the defendant should have been tried for maintaining a nuisance, and if convicted, the order of abatement should have been in conformity with the provisions of the ordinance. *Reversed and Remanded.*

CHIEF JUSTICE MUSSER concurs specially.

Mr. JUSTICE SCOTT concurs.

CHIEF JUSTICE MUSSER specially concurring in a reversal:

While I concur in a reversal of the judgment, I am unable to agree with all that is said in the opinion of Mr. Justice Garrigues, and am, therefore, impelled to give my reasons for a reversal.

The eighteenth sub-division of section 6525 of the Revised Statutes of 1908 gives to boards of trustees in towns such as Akron power over liquors in language as follows: "To have the right, subject to the laws of the state, to license, regulate or prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor within the limits of the * * * town, or within one mile beyond the outer boundaries thereof, except where the boundaries of the two * * * towns adjoin; the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license;" etc.

This statute gives a town the same power to regulate or prohibit the sale of intoxicating liquors within one mile beyond its boundaries as is given to it with respect to the same matter within its limits. If the town may prohibit such sale within its boundaries by the exercise of a power given it, the sale may be prohibited in the same way within one mile beyond its boundaries. Sub-division forty-five of the same sec-

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tion gives to such boards of trustees the power "To declare what shall be a nuisance and to abate the same, and to impose fines upon parties who may create, continue or suffer nuisances to exist." This sub-division grants the power, (1) to declare what shall be a nuisance, (2) to abate the same, and (3) to impose fines upon the parties designated. It appears to me from this sub-division that the town may abate a nuisance by proceeding against the thing itself or procure its abatement by imposing a fine upon the person who may suffer it to continue, or abate the nuisance in some way and fine the party responsible. This sub-division is not self-executing. It is necessary for a town to do something to carry the power granted into effect, and in the sixty-sixth sub-division of the same section a town is given the power to pass all ordinances and rules and to make all regulations proper or necessary to carry into effect the power granted. By virtue of the eighteenth sub-division aforesaid, a town may, by an ordinance, declare unlawful the selling of intoxicating liquors within its limits or within one mile beyond its outer boundaries. There is no doubt, under the authorities, that when a town has, by ordinance, made it unlawful to sell or keep for sale intoxicating liquors within its limits it may denounce such selling or keeping for sale as a nuisance, and under such circumstances the denunciation is conclusive.—*Lauzel v. Bushnel,* 197 Ill. 20; *Houston v. Walton,* 23 Colo. App. 282, 129 Pac. 263, and authorities therein cited. It may do this with reference to the selling or keeping for sale of intoxicating liquors within one mile of its limits, because by sub-division eighteen it is given the same power with respect to intoxicating liquors within one mile of its limits as within its limits. After a town has thus declared such sale or keeping for sale a nuisance, it may provide for the abatement thereof. Like the power to denounce the nuisance, the power to abate it can not be effective until the town elects to exercise the power and declares how it shall be exercised. This power is not self-executing, but must be carried into ef-

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fect by some affirmative action of the town. This must be true, for nuisances may be abated in various ways, and it was surely not intended to leave the manner of their abatement to the whim of the officers or persons authorized to abate them.

The particular nuisance denounced in this case was not the liquor itself, but it was the unlawful sale or keeping for sale that constituted the nuisance, and it was the selling or keeping for sale that was to be abated. It might have been abated by destroying the liquor, by removing it more than one mile beyond the limits of the town, by finding the person selling it or keeping it for sale for each day of its maintenance, so that he would be induced to cease selling it or keeping it for sale, or the town might conclude that its abatement might be obtained by fining the person a single amount. It seems to me that it is for the board of trustees, to whom the power to abate is granted, to determine in some suitable way the lawful manner in which they will exercise the power, and the manner, if lawful, so determined by the board is the one to be followed by the town officers. What did the trustees of the town of Akron do in regard to this matter? The record discloses section 11 of ordinance 74 of the town of Akron, as set out in the opinion of Mr. Justice Garrigues. It is plain that the portion of the printed ordinance, which was not published, to-wit, "and may be abated as any other nuisance," is not a part of the ordinance. If we assume that the rest of the ordinance stands, which is the most that can be assumed for the defendants in error, the section provides that the selling or keeping for sale of intoxicating liquors within the territory mentioned is unlawful, denounces such selling or keeping for sale as a nuisance and imposes a fine for any violation of the provisions of the section. The only penalty prescribed by this ordinance for the violation of any of its provisions is a fine. The only manner declared by the ordinance by which an abatement was sought or might result was the imposition of a fine. The trustees, by this ordinance, had not determined to abate the

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nuisance therein denounced by a destruction of the liquor. If the ordinance had provided that, upon conviction before the magistrate, the liquor should be seized and destroyed, an entirely different question would be presented and one upon which I express no opinion because it is not in this record.

When the defendant was charged in the magistrate's court with selling and keeping for sale intoxicating liquors, it appears to me that he was sufficiently charged with maintaining a nuisance, for it was the selling or keeping for sale of liquor that was denounced as a nuisance and the declaration in the ordinance that it was a nuisance was conclusive on that point, as is amply sustained by the authorities cited above. The trial and judgment in the magistrate's court was a judicial determination of the fact that he did maintain a nuisance, and the magistrate imposed a fine as provided in the ordinance. That is as far as the magistrate could go under that ordinance.

If the words not published, to-wit, "and may be abated as any other nuisance," were a part of the ordinance, still the defendants would not be justified so far as this record is concerned, for no ordinance of the town of Akron was introduced showing that the board of trustees had elected to abate such a nuisance by the destruction of the property. The court would not be able, under such circumstances, to say that the nuisance was abated as any other nuisance.

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[No. 7823.]

## THE PEOPLE FOR THE USE OF THE LAMAR PUBLISHING COMPANY V. HOAG ET AL.

PUBLIC OFFICER—*Violation of Public Duty—Liability to Private Action*—The statute directing the county clerk to publish, prior to every election, the list of all nominations (Rev. Stat., Sec. 2159) prescribes a public duty, for the benefit of the public only. It imposes upon the clerk no duty towards the publisher of any newspaper, and his refusal to make such publication in the only daily newspaper of the county affords no action to such publisher.

*Error to Prowers District Court.*—Hon. HENRY HUNTER, Judge.

Mr. C. C. GOODALE, for plaintiff in error.

Messrs. MERRILL & MCCARTY, for defendants in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

The plaintiff in error filed a complaint in the court below, alleging substantially that Hoag was the county clerk of Prowers county, and the National Surety Company was surety on his official bond; that the publishing company was the owner and publisher of the only daily newspaper in that county; that it was entitled to have published, and that it was the duty of the county clerk to publish, therein, for at least six consecutive days prior to the election day in November, 1910, the list of all the nominations to office to be voted for at that election as provided in section 2159, Rev. Stat.; that the publishing company demanded of the county clerk that he publish this in the said daily newspaper for six successive days prior to the election, which the county clerk, in breach of his duties in that behalf, failed and refused to do, whereby the publishing company was damaged.

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To this complaint a demurrer was filed, on the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the court, and the plaintiff refused to further plead; whereupon, the complaint was dismissed and judgment rendered against the plaintiff for costs.

It is the contention of the plaintiff in error that it was the duty of the county clerk to publish the list of nominations in the daily newspaper, and if the clerk would have performed his duty in that behalf the paper would have received from the county, in payment for such publication, the sum of $972.00, and that because the plaintiff refused to publish it the publishing company was damaged in that sum. The defendants in error deny that the statute imperatively required the clerk to publish the list in a daily newspaper. We will not determine this, but will assume that the statute required that the clerk should publish the list in a daily newspaper if there was one published in his county. The plaintiff in error contends that while the duty of the county clerk to publish the list of nominations in the daily newspaper was a public duty, yet in this public duty was involved also a duty to the publishing company, and that the latter has suffered a special and peculiar injury by reason of the non-performance of the duty by the county clerk on the principle announced in Cooley on Torts, (3rd Ed.) p. 757, and 23 Am. and Eng. Ency. of Law, p. 379. *Gage v. Springer,* 71 N. E. 860, is cited to show the applicability of that principle to this case. There, however, the individual had paid a special assessment for a public improvement of a certain quality, and the public official had corruptly permitted the substitution of an inferior and cheaper quality. The publishing company, in this instance, did not part with any special consideration to obtain the publication, nor is the clerk charged with any corruption in failing to publish. Nor is the case of *Wright v. Shanahan,* 149 N. Y. 495, of assistance. There, it was the duty of the official to remove flush boards from the crest of a dam so as to permit the waters of a lake to flow over it until

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the spring freshets had passed. As we understand that case, the duty imposed, and which had not been performed, was mainly for the purpose of preventing the impounded water from overflowing private lands. Of course under such circumstances, the injury was peculiarly of a private nature. *Raynsford v. Phelps,* 43 Mich. 342, is another case cited by plaintiff in error. There a statute provided that it was the duty of a tax collector to make collection from personal property upon the land before resort should be had to the land itself. Instead of performing that duty the collector falsely made a return of no goods, which made the land liable and it was sold. There the duty to take the personal property was more for the individual than for the public. The only interest the public had was that the tax should be collected, and it made no special difference to it whether it was collected out of the personal property or the land.

The statute requiring the clerk to publish the list of nominations was clearly intended for the benefit of the public, and not for the benefit of newspapers. The benefit to the latter was only incidental. Certainly the law was not passed with the idea of benefiting publishers. So that the duty imposed was purely a public one. When the duty imposed upon an officer is one to the public only, its non-performance must be a public, and not an individual injury, and must be redressed in a public prosecution of some kind, if at all.—2 Cooley on Torts, (3rd Ed.) 756. Numerous instances are given by the author. For instance, the duty of a policeman is to watch the premises of individuals and protect them against burglary and arson. If he goes to sleep in front of a house, and a burglar enters it or it burns down, which would have been prevented had the policeman been awake, the owner can not recover from the policeman, for the latter owed the former no legal duty. His duty was to the public. The author says further on:

"An individual can never be suffered to sue for any injury which technically is one to the public only; he must show

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a wrong which he specially suffers, and damage alone does not constitute wrong."

In *Miller v. Ouray E. L. & P. Co.*, 18 Colo. App. 131, the minor son of the plaintiff, while confined in a jail, charged with a criminal offense, was suffocated by a fire which took place in the jail. The fire was charged to have been caused by defective electric wiring of the building. The county commissioners were made defendants with the electric light company. The plaintiff sought to hold the commissioners liable because the statute required them to make personal examination of the jail, of its sufficiency and management, and to correct all irregularities and improprieties found therein, which it was charged they failed to do. It was held that the duty imposed by the statute was a public one, and its breach was held not to constitute a private wrong for which the injured party could recover in an individual action. *Colo. P. Co. v. Murphy*, 78 Fed. 28, was a case in which Murphy, in his complaint, alleged that he was the lowest reliable and responsible bidder on a paving contract in the city of Denver, notwithstanding which, the board of public works awarded the contract to the paving company, in violation of a provision of the city charter that the contract should be awarded to the lowest reliable and responsible bidder. The court held that it was obvious that the provision of the charter was not enacted for the benefit of bidders, and that Murphy had no right of action. The court quoted from *Strong v. Campbell*, 11 Barb. 135, 138, wherein it was said:

"Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action."

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In *Talbot P. Co. v. Detroit,* 67 N. W. 979 (Mich.), the substance of the opinion is stated in the *syllabus,* thus:

"Though a city charter requires contracts to be let to the lowest bidder, the lowest bidder under a contract proposed to be let by it, whose bid has been rejected, has no right of action at law against the city, to recover the profits which might have been made had his bid been accepted."

It was so held because the charter provision was not passed for the benefit of the bidder, but as a protection to the public. So in the present case, the statute was not passed in order that newspapers might make money by the publication of the list of nominations, but in order that the voters should be advised of the candidates whose names would appear upon the ticket at the election. The ruling of the district court, therefore, in sustaining the demurrer to the complaint, was right, and the judgment is affirmed. *Judgment affirmed.*

MR. JUSTICE GARRIGUES and MR. JUSTICE SCOTT concur.

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[No. 7825.]

## BECK v. SCHOOL DISTRICT NO. 2, IN THE COUNTY OF BENT.

1. EQUITY—*Reformation of Writings*—The general rule is that a contract entered into under mistake as to some essential element may be avoided in a proper action.

The defendant was indebted to plaintiff in $3,500, the balance of the contract price for the erection of a school-house. Through mistake as to the amount which he had received he stated the balance due him at $2,285.00, and claimed the further sum of $200.00 on account of extras, and damages by reason of delays of the district. A compromise was finally effected by which he accepted $2,385.00 in full settlement of his demand, each party believing at the time that this was the true balance of the contract price. Plaintiff was entitled to vacate the settlement, and have a new settlement made based upon tre true facts.*

2. ——*Mistake of One Party Only*—In the same case it was said that if defendant, being conscious of plaintiff's mistake, took advantage of it, he would still be entitled to relief.

**Syllabus* by Musser, C. J.

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*Error to Bent District Court.*—Hon. HENRY HUNTER, Judge.

Mr. H. L. LUBERS, for plaintiff in error.

Mr. ALLEN M. LAMBRIGHT, for defendant in error.

CHIEF JUSTICE MUSSER delivered the opinion of the court:

The object of this proceeding is to review the action of the district court in sustaining a general demurrer to a complaint filed by the plaintiff in error, and a judgment against him for costs, he having elected to stand on the complaint. The complaint alleged that the plaintiff had entered into a contract with the school district to erect a school-house for $5,785.00, setting out the contract; that the plaintiff erected the school-house, and thereafter on the 26th day of May, 1910, sent to the directors a statement of the amount due him, wherein he stated that the balance unpaid on the contract price was $2,285.00, and there was due him for extras $100.00, and for damages for delay of removal of the old building and material $100.00, making a total of $2,485.00; that on May 27th, believing the statement rendered and sent by him to be true, he wrote a letter to the school-board offering to accept $2,300.00 in full, providing settlement was made at once. Then comes the following allegation:

"That on the 4th day of June, A. D. 1910, the plaintiff and defendant came to an accounting and settlement, they mutually believing the statement made by the plaintiff to the defendant, dated the 26th day of May, 1910, wherein a balance of $2,285.00 was shown in favor of the plaintiff on the contract price for the said building, to be a correct statement of the balance due, and both parties, acting in that belief, thereupon entered into a written settlement, which is in words and figures as follows:

Then follows the contract of settlement, wherein it was recited that the plaintiff and the school-district through its

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board of directors, entered into a written agreement for the erection of the school building; that divers sums of money had been paid to the plaintiff on account of the contract; that divers disputes existed between the parties, the board claiming that the contract had not been kept by the plaintiff, and that they had been delayed in the use of the building and thereby greatly damaged, and that they became liable for architect's charges, time and expense, and had been otherwise damaged, and that the plaintiff also claimed that he had been delayed with his work by the failure of the board to remove the old school-house and furnish cement on demand; that the plaintiff had offered to compromise the differences and to take and accept the sum of $2,385 in full payment, satisfaction and discharge of all the balance due on account of the amounts to be paid under the said contract, and all extras and damages of whatever nature, and in full for all sums due him, and the district had accepted the compromise offered. After the recital of these matters, the contract stated that in consideration of the premises, and of one dollar to each party in hand paid by the other, and in consideration of the payment of $2,385 to the plaintiff, the receipt of which he acknowledged, each party acknowledged that settlement in full had been made of all amounts due or to become due under the building contract, or any extras or damages, in whatever manner, arising out of said contract and of all damages or claims held by said district against the plaintiff, on account of any delays, damages, or default in any manner, and the parties released and discharged each other from all claims, debts or liabilities which existed between them. The complaint then alleged that since the settlement, the plaintiff had discovered error and false credit given the district, of which he was ignorant at the time, and that the statement of account rendered by him, showing a balance of $2,285 unpaid him on the contract price, was error and wrong; that the balance due was $3,285, and set forth the payments made; that the error arose on the part of the plaintiff, through the fact that he was erecting another school-house for

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district No. 7, and had received a payment from that district of $3,500, and, through inadvertence, error and mistake, mixed the accounts of the two districts, and had given the defendant district a credit of $3,500, which was $1,000 more than he had received from it, and then alleges:

"That, on June 4th, 1910, the plaintiff, believing that he had received from the defendant the sum of $3,500.00 on such contract, and the board of directors of the defendant believing that they had paid such sum unto the plaintiff, they and each of them, in that belief, entered into said final written settlement of said date; and that said settlement is incorrect in that the balance therein should have been $3,300.00 in favor of the plaintiff instead of $2,300.00."

The complaint then goes on and alleges that as soon as the plaintiff discovered the error, about one week after the settlement, he notified one of the directors of the mistake and asked that it be corrected, and that the defendant pay him the further sum of $1,000; that from time to time thereafter he had demanded of the several directors the payment of said sum, and that the directors refused to correct the settlement of June 4th. Plaintiff prayed to be let in to prove the error in stating the account and in the settlement of June 4th, and that the same be corrected, and that there be judgment against the defendant for $1,000 with interest.

There is no doubt that the complaint alleges that the settlement of June 4th, evidenced by the written contract, was made upon the understanding by each of the parties that the balance due on the contract price was $2,285, and that it alleges that both parties were mistaken about this and that the true amount unpaid on the contract price was $3,285 instead of $2,285. So that it appears from the complaint that the compromise offer made by the plaintiff, and its acceptance by the defendant, and the written agreement of settlement of June 4th, occurred without consideration by either of the parties of this difference of $1,000, and was based upon mutual error and mistake. There can be no question that the amount un-

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paid from the district to the plaintiff on the contract price was an essential element to be considered in the settlement of the controversy existing between them, and that the complaint alleges that there was a mistake made as to this element. In 1 Page on Contracts, sec. 71, it is said that it is substantially unquestioned that the general rule is that a contract entered into because of mistake as to an essential element is void. Perhaps it is better to say that the general rule is that a contract entered into because of a mistake as to some essential element may be avoided in a proper action. If the plaintiff made his offer of compromise under the mistaken idea that he had received $3,500 from the district when he had received but $2,500, and the directors, falling into the same error, or knowing that the plaintiff was in error, took advantage of it, accepted the compromise offer, whereupon the contract of full settlement was made, it certainly seems that in equity and good conscience the plaintiff ought to be relieved from such a contract, induced by such an error, and an examination of the authorities show that they are practically unanimous in saying that such a mistake will vitiate such a contract. In 1 Page on Contracts, sec. 72, it is said:

"So if A gives his note to B, thinking that there is a balance due from him to B for which such note is given, when in fact nothing is due, such note may be avoided as to B or an indorsee with notice. Thus if A is mistaken as to the amount of his indebtedness and under such mistake gives a note for too large an amount, equity will give recission and cancel the note on payment of the amount due, and if he has overpaid his debt will decree repayment of such excess. A similar rule exists where one by mistake assumes a debt due him to be smaller that it is. * * * So if under a mistaken belief that no credit had been given for a payment which had been made, and in fact credited, the creditor gives a receipt in full on payment of less than the real amount due in pursuance of a contract settling the account, he may recover such difference. Any other contract entered into under mistake as to the

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amount due on a pre-existing liability and based thereon, may be avoided for such mistake."

In *St. L. L. B. B. Co. v. Colo. Nat. Bank,* 8 Colo. 70, it is said that an account stated or settled is open to impeachment for mistakes or errors. The following authorities, wherein settlements induced by or made through mistakes as to essential elements occurring in various ways and wherein such settlements were set aside or the injured party permitted to recover the amount lost by the mistake, support the conclusion that if the allegations of the complaint in this case are true the plaintiff is entitled to relief: *Lowler v. Jennings,* 55 Pac. 60; *Russell & Co. v. Stevenson,* 75 Pac. 627; *Gould v. Emerson,* 160 Mass. 438; *Carpenter v. Kent,* 5 N. E. 787; *Conville v. Shook,* 39 N. E. 405; *Aultman Co. v. Graham,* 29 Ill. App. 77; *Powell v. Plant,* 23 So. 399; *Fink v. Smith,* 170 Po. 124.

The complaint sets out the contract of settlement and the plaintiff prays to be let in to prove the error in the settlement and that it be corrected. This shows sufficiently that the plaintiff desires that the contract of settlement of June 4th be set aside and a new settlement be made, based upon the true facts, and undoubtedly, if the allegations of the complaint are true, the plaintiff is entitled to such relief, and the court erred in sustaining the demurrer. The judgment is, therefore, reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

*Reversed and Remanded.*

Mr. JUSTICE WHITE and Mr. JUSTICE BAILEY concur.

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[No. 7831.]

## CASTNER v. GRAY.

1. DIVORCE—*Appearance of Defendant—Effect*—Action by husband for a divorce. The wife's voluntary appearance dispenses with the service of process, and confers jurisdiction upon the court.

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2. PLEADINGS—*Judgment on the Pleadings*—Where the reply admits the substantial averments of a sufficient answer defendant is entitled to a judgment on the pleadings; and a judgment accordingly, is not erroneous even though a demurrer pending to the replication remains undisposed of.

3. JUDGMENT—*Record Construed*—The record declaring that plaintiff elected to "stand upon his replication" held to show that a demurrer thereto was sustained.

*Error to Montrose District Court.*—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. DEXTER T. SAPP and Mr. JAMES B. NASH, for plaintiff in error.

Mr. HUGO SELIG and Mr. T. J. BLACK, for defendant in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

1. Plaintiff Castner alleges that he employed and paid the defendant Gray as an attorney at law, to bring a divorce action in the county court of Montrose county against his wife Nellie Castner; that the defendant did not use ordinary care and diligence in bringing, conducting and prosecuting the case for plaintiff in this: that he filed the complaint May 10, 1907, but neglected to issue any summons, and without causing such a writ to be issued or served on the defendant, induced the court to try the case the next day, and render judgment granting plaintiff a divorce; that his wife did not appear in the action, or at the trial, and the court acquired no jurisdiction over her person, so that on the 25th day of June, 1909, upon her motion the decree was vacated and set aside, thereby causing him large additional expense in re-trying the case, to his damage, etc.

Defendant in his answer admits that the case was tried, and a divorce decree entered May 11, 1907, against Nellie Castner without a summons being issued or served upon her;

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but alleges that prior to the hearing she voluntarily entered her written appearance and consent to a trial at the convenience of the court, as follows:

"State of Colorado,

ss. County Court.

County of Montrose.

Quincey O. Castner,

*Plaintiff,*

vs.

Nellie Castner,

*Defendant.*

Action for Divorce.

Now comes defendant appearing in this action for divorce, and enters her appearance herein, and announces that the case may be called for hearing in its regular course and at the convenience of the court.

(Signed) NELLIE CASTNER, Defendant."

Plaintiff in his replication admits that his wife entered her written appearance in the action in the manner and form as alleged in the answer; but denies that it was sufficient in law.

There were other matters pleaded; but this, we think, states the material issue in the case.

The record recites that a demurrer was filed to the replication, and the cause coming on to be heard, plaintiff elected to stand by his replication. Whereupon defendant moved for judgment on the pleadings, which was granted, and a judgment for costs entered against the plaintiff, who brings the case here on error.

2. The record does not affirmatively say that the court passed on the demurrer, and it is urged that it was reversible error to entertain defendant's motion for a judgment on the pleadings without disposing of the demurrer. Plaintiff cannot complain here because the court did not dispose of the demurrer before rendering judgment on the pleadings. If, as a

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matter of law, defendant was entitled to such a judgment, it could make no difference to plaintiff what became of that demurrer. Aside from this, the fact that the record recites that plaintiff elected to stand upon his replication, shows that the demurrer was sustained.

3. Mrs. Castner, knowing that her husband had filed an action for divorce, voluntarily entered her written appearance in the case, which, irrespective of what may be said regarding the regularity of the subsequent proceedings, was sufficient to confer jurisdiction over her person, and there was no necessity of serving her with summons. This issue being a matter of law, there was nothing to submit to the jury. The action of the court in entering a judgment for defendant on the pleadings was proper, and the judgment will be affirmed.

*Affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

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[No. 7840.]

## CURTIS v. NUNNS.

1. MECHANIC'S LIEN—*Date of Completion of Building*, settled by the opinion in *Curtis v. McCarty*, 53 Colo. 284.

2. ——*Acceptance of Building by Owner from Contractor*, does not set in course the statute prescribing the time in which a sub-contractor must proceed to enforce his lien.

3. ——*Failure to Record Contract—Effect*—Where the sum to be paid by the owner for the erection of the building exceeds $500.00, and he fails to cause such contract to be recorded as required by sec. 4025, Rev. Stat., every sub-contractor, material man, etc., is placed in the position of principal contractor, so far as relates to his claim of lien, and no notice of his lien is required to be served on the owner, under Rev. Stat., sec. 4033.

*Error to Garfield District Court.*—Hon. JOHN T. SHUMATE, Judge.

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Mr. JAMES R. MOORE, for plaintiff in error.

Messrs. DARROW & ROWE, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This action was to establish and foreclose a mechanic's lien. The plaintiff claimed a lien in the sum of $413.70 for work and labor performed in the construction of defendant's dwelling. This included the assigned claim of $34.50 of another laborer upon the same building, but the same state of facts exists as to both. The court sustained the claim of lien and ordered foreclosure. The errors alleged are:

"(a) Plaintiff's action was not commenced within six months after the completion of the building;

(b) Plaintiff's lien claim statement was not filed in the office of the county clerk and recorder of Garfield county within one month next after the completion of the building;

(c) The owner of the property was not served with a copy of the lien claim statement at or before the time same was filed in the office of the county clerk and recorder."

Much of this contention hinges on the date of the completion of the building. This question was determined by this court as to the same building in the case of *Curtis v. McCarthy,* 53 Colo. 284, 125 Pac. 109.

Under the state of facts in that case presented, and not materially different in this case, it was there held that the building was completed on the 15th day of October, 1910. The trial court so found in this case, and for the reasons given in *Curtis v. McCarthy, supra,* the finding will not be disturbed. This suit was filed on the 7th day of April, 1911, and therefore within six months from the completion of the building, October 15th, 1910, as required by the statute. Sec. 4034, Rev. Stat. 1908.

But Curtis testifies that he accepted the building on September 7th, 1910, from Lukenbill, his principal contractor, and at that time specifically waived all objections to it, and it is

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argued that this fixes the time of completion as of that date, regardless of what may be found to be the fact as to the time of actual completion.

This testimony is from its very nature self serving, and is strangely in contradiction of the conduct of Lukenbill, who refused to pay plaintiff, or accept his work until he had performed the labor demanded of him by Lukenbill, and which was performed by plaintiff on October 15th, 1910. But, as will appear hereafter, the plaintiff in so far as his claim of lien is concerned, was to that extent a principal contractor and as such may have filed his statement of lien at any time within three months from the completion of the building. But it has been held by this court that the fact that the owner accepted the building from the principal contractor, who had completed his contract, did not start the statute running as against a person who had furnished material to such contractor, and where after such acceptance, there was put into the building by others, material or labor not trivial in character.—*Lichty v. Houston Lumber Co.*, 39 Colo. 53.

It would be a singular state of the law if Curtis, the owner, could by words of acceptance addressed to his principal contractor, with no recorded contract to guide sub-contractors, thus change the actual time of completion, and in this way defeat the honest claim of a sub-contractor.

The last work and labor was performed on the 9th day of September, 1910. The statement of lien was filed on the 8th day of October, 1910, and after the last labor for which the lien is claimed, was performed, and within one month after the completion of the building. Sec. 4033, Rev. State. 1908.

But service of a copy of the lien statement was not served upon the owner or reputed owner, at or before the time of filing with the county clerk and recorder, as provided by said Sec. 4033. It is contended that such service is jurisdictional, and hence in this case the claim of lien may not be sustained.

The plaintiff in error, owner of the building, entered into a contract with one Lukenbill as principal contractor for the

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construction of the building. The defendant in error and his assignor, were employed by Lukenbill. It is admitted that the contract price exceeded the sum of $500.00 and that the contract was not filed for record as provided by the statute, sec. 4025, Rev. Stat. 1908. But this statute also provided:

"And in case such contract is not filed as above provided, the labor done and materials furnished by all persons aforesaid (mechanics, material men, contractors, sub-contractors, builders and all persons of every class perforimng labor upon * * * any building) before said contract or memorandum is filed, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof."

Therefore, in case of failure to file the contract for record under this proviso, the labor performed by a sub-contractor, shall be deemed to have been done at the personal instance of the owner, and such claimant is to that extent placed in the position of the principal contractor in so far as it relates to his claim of lien.

But no copy of the contract between Curtis, the owner, and Lukenbill, the contractor, was filed with the clerk and recorder as provided in sec. 4025, Rev. Stat., and therefore under that section, the work and labor performed by the plaintiff is deemed to have been done at the personal instance of the owner, and he is entitled to a lien for the value thereof.

Under this state of the law and the facts presented here, the plaintiff stands in the light of an original contractor in so far as it relates to the matter of the establishment and enforcement of his lien. Therefore the notice is not required to be served in such case.—*Kellogg v. Howes,* 81 Cal. 170.

The Judgment is affirmed.

CHIEF JUSTICE MUSSER and MR. JUSTICE GARRIGUES concur.

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[No. 7848.]

## POWERS v. CITY OF BOULDER.

1. MUNICIPAL CORPORATIONS—*Action for Personal Injury—Notice*—Where in an action against a municipal corporation for a personal injury attributed to its negligence, it appears that notice in writing, in all respects sufficient, was served upon the mayor in due time, that he accepted it and waived the service of further notice, and that the council within the statutory period considered such notice and acted thereon in their official capacity, the purpose of the statute (Rev. Stat., sec. 6661) is accomplished, and the plaintiff's failure to serve notice upon the clerk does not defeat the action.

2. ——*Notice to the Clerk*, affects the city, though the clerk fail to communicate it to the council.

3. PLEADING—*Ambiguity*, not complained of by special demurrer or motion is waived.

*Error to Boulder District Court.*—Hon. HARRY P. GAMBLE, Judge.

Mr. F. T. JOHNSON and Mr. J. M. ESSINGTON, for plaintiff in error.

Mr. J. T. ATWOOD, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action upon the part of the plaintiff on account of personal injuries alleged to have been sustained by him by reason of certain acts of negligence upon the part of the defendant city. A general demurrer to the amended complaint was sustained by the trial court. The plaintiff elected to stand upon his amended complaint, and the ruling of the court sustaining the demurrer is the only question presented, and this is confined to the allegations as to service of notice of the injury, required by the statute.

The allegation of the amended complaint in this particular, is as follows:

"That on or about August 24th, 1911, plaintiff caused a written notice of said accident to be served upon the defendant by serving the same upon its mayor, respectively setting forth

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the time, place, and cause of said injuries, and plaintiff further alleges that at the time of said service plaintiff was informed by said mayor that he the said mayor, would accept service of said notice for and in behalf of said defendant, and that plaintiff need not serve any other or further notice upon any other officer of said city, all of which plaintiff relied upon as being sufficient and valid in every way so far as serving any other or further notice was concerned, and plaintiff alleges upon information and belief that as a matter of fact the said city and its duly constituted authorities consisting of its mayor, board of council and clerk thereof, had full notice of said accident and plaintiff's injuries arising therefrom in their official capacity, within ninety days from the happening thereof, and duly acted thereon in their official capacity." Revised Statutes of 1908, sec. 6661, provides:

"No action for the recovery of compensation for personal injury or death against any city of the first or second class, or any town, on account of its negligence, shall be maintained unless written notice of the time and place and cause of injury is given to the clerk of the city or recorder of the town by the person injured, his agent or attorney, within ninety days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But the notice given under the provision of this act shall not be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury; *provided,* it is shown that there was no intention to mislead and that the city council or board of trustees was in fact not misled thereby."

There is no objection that the notice was not in writing, nor that it was not in all respects sufficient, nor that it was not served within the time provided, but only that it was served on the mayor of the city rather than the city clerk, as provided by the statute.

Did such allegation of service upon the mayor, when considered with the additional allegation as to official consideration by the constituted authorities, meet the substantial re-

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quirement of the statute? The complaint in addition to service of the notice upon the mayor, alleged "that the mayor, clerk and board of aldermen all had full notice of the accident and plaintiff's injuries in their official capacity within ninety days thereafter, and that the mayor declared at the time of the service on him, that no further notice would be required."

There is no claim that the city council did not have full or sufficient notice, or that they did not act on it. The defendant rests solely upon the technical contention that the service was not made upon the city clerk, as designated by the statute, but who by the very nature of things, could perform no other duty in the matter than to present it to the mayor and council, who were vested with authority to act in the premises.

It may be conceded, that the part of the complaint wherein it is said, that the mayor, board of council and clerk, all "had full notice of said accident and plaintiff's injuries arising therefrom, in their official capacity, within ninety days from the happening thereof, and duly acted thereon in their official capacity," was ambiguous, and that the court may have well sustained a motion to make the complaint more specific, definite and certain in that particular, or have sustained a demurrer upon such specific ground; but no such motion or demurrer was presented, and therefore the right to attack the complaint on the ground of such ambiguity was waived. The complaint was not for this reason alone subject to general demurrer. Under these circumstances the complaint may be construed to charge that the mayor, clerk and council were in fact presented with the notice so served on the mayor, and that they acted officially thereon, and within the time required by law. If so, then every purpose of the notice was accomplished.

It is true that service of a sufficient notice on the clerk would have bound the city in that respect, even though he may not have presented it to the mayor and council at all. But the sole purpose of the statute is to give the mayor and council notice of the claim of damage for the specific injury, within the designated time, so that they may have opportunity to take of-

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ficial action thereon, and to properly protect the interests of the city.

In the case of *City of Grand Forks,* 153 Fed. 532, it was held, by the United States circuit court of appeals, where such notice was required by the statute to be presented to the mayor and city council, that the presentation of such notice to the city auditor was a sufficient compliance with the statute, and the court there said:

"A brief reference to the statutes and decisions of North Dakota will serve to show that the filing of the claim with the auditor was a presentation of it to the mayor and council within the meaning of the law. The mayor and common council of each city is constituted a board of audit of such city. Sec. 2171, Rev. Code, 1899. The city council consists of the mayor and aldermen. Sec. 2172, Rev. Code, 1899. Only the writing signed by the plaintiff and properly verified is contemplated by section 2172, *supra.* When so executed and verified, it is to be presented to the mayor and council 'for audit and allowance,' sec. 2174. Giving due consideration to these provisions of the statutes considered collectively, we cannot agree with counsel for the city that the claim should have been presented to the mayor separately from the council. The claim manifestly should be so presented to the body authorized to audit it as to secure the attention of that body, and, when it is done, it would seem that the requirement of the statute has been complied with."

To the same effect is *Pyke v. City of Jamestown,* by the supreme court of North Dakota, 107 N. W. 359, construing the same statute. The facts in that case were as follows:

"He presented one copy to the mayor and one copy to the city auditor. The copy presented to the mayor was delivered at his office. The copy delivered to the auditor was delivered upon the street. Accosting that officer, he inquired whether he was the city auditor, and, receiving an affirmative answer, he gave him the copy, informed him what it was, and stated that he desired to have it presented at the next meeting

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of the city council. The claim was addressed: 'To the city council of the city of Jamestown, N. D.' The mayor testified that he submitted the copy he received to Mr. Thorp, the city attorney. He also testified that 'the notice was not discussed or presented to the council at any time.' Two aldermen testified to the same effect. The present city auditor testified that he could find no copy of the claim among the records, and no entry in reference thereto. The auditor to whom the claim was presented died in the following December." Commenting upon this the court said:

"We are of the opinion that the presentation was sufficient. The manifest purpose of the statute is to protect cities from the unnecessary expense and the annoyance of legal proceedings until claims against them can be investigated. The person injured must present his claim within 60 days from the date of the injury, during which period the facts are fresh and ascertainable. The city is given 60 days thereafter in which to inform itself as to the merits of the claim and determine whether it will audit and allow it. If not allowed at the end of that period, the party injured may pursue his remedy by action."

The Minnesota statute requires such notice to be given to the city council or other governing body. In *Lyons v. City of Red Wing,* 76 Minn. 20, the notice was left with the clerk who read it to the council. This was held to be a sufficient compliance with the statute.

In *Wormwood v. City of Waltham,* 144 Mass. 184, the law required the notice to be given to the mayor, clerk or treasurer. The notice was given to an alderman and was afterward read to the board of aldermen. This was held sufficient.

In *James v. City of Boston,* 201 Mass. 348, construing the same statute, it appears that one acting for the plaintiff, handed the notice to a person in the clerk's office and asked that it be handed to the clerk, the person saying "all right." This was held to be good. So in this case, if the notice was handed to the mayor, and if such notice was officially consid-

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ered by the mayor, clerk and council, what important difference can it make to the defendant? Every purpose of the law was thus accomplished and to hold that the plaintiff must hand the notice to the clerk personally in order to substantially comply with the statute, is to demand form and ignore substance.

If the allegations in the amended complaint as herein construed, are sustained by the proof, then the notice in this case was sufficient.

The demurrer should have been overruled.

The judgment is reversed and the case remanded for further proceedings, in accord with this opinion.

*En banc.*

JUSTICE HILL, JUSTICE GARRIGUES and JUSTICE WHITE dissenting.

Mr. JUSTICE GARRIGUES dissenting:

I cannot agree with the majority opinion. I think service of the notice required by statute to be made upon the clerk before bringing suit, is a condition precedent to the right to bring the action. The legislature having the power to deny the right to bring the suit, could prescribe the conditions under which it could be brought. In my opinion *Denver v. Saulcey,* 5 Colo. App. 420, is decisive of this case. It is there said on page 422:

"The charters of nearly all cities contain a provision like that found in the charter of this city. In providing satisfactory plans for municipal government, it seems to have been found expedient to attach this requirement as a condition precedent to the general right which the injured person is given to recover damages for such alleged wrongs. Since the right to sue the city is a matter of statute, lawmakers have the undoubted right to require the observance of these reasonable conditions. Wherever similar provisions have come before the courts for construction, it has been almost if not quite

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universally held that the giving of the notice in the form and in the manner prescribed is a condition precedent, without which the plaintiff may not maintain his action."

I am authorized to state that Mr. Justice Hill and Mr. Justice White concur in this dissenting opinion.

Mr. JUSTICE WHITE dissenting:

I think the giving of the notice of injury in the form and in the manner prescribed by statute, and upon the person designated, is a condition precedent to the right of plaintiff to maintain his action; and that the complaint, having failed to allege such facts, the demurrer thereto was properly sustained. In *City of Denver v. Soulcey,* 5 Colo. App. 420, 422, it is said: "The notice must not only contain all the things the statute requires, but it must be served on the persons which the law designates, and in the way specified, if the statute be specific in this particular. * * * The importance of making the service on the proper person has been a matter of judicial consideration, and it has accordingly been adjudged that where the service must be upon a trustee or upon a mayor or upon a council, service upon the clerk, even though he be one of the principal officers of the corporation, is not such a compliance with the provision as to permit the maintenance of the suit." Citing *Nichols v. The City of Boston,* 98 Mass. 39; *Underhill v. The Town of Washington,* 46 Vt. 767; Wade on the Law of Notices, secs. 1312, 1313.

And in 28 Cyc., p. 1459, it is said that: "Service of notice or presentation of the claim must be made in the manner prescribed by the statute; or, if not prescribed, then as provided by general law for the service of notice, and within the time prescribed. The notice or statement must be served upon or presented to the board or officers designated in the statute to be notified, such as the corporation counsel, or city council."

It may be that if the *city clerk* and council were, in fact, presented with the notice within the time limited by the stat-

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ute, it would be a sufficient service upon the clerk, though it had actually been brought before him by the mayor. But I am unable to find in the complaint any fact alleged that would warrant the conclusion, or even inference, that these things occurred. How it can be said that the allegation "that the mayor, clerk and board of aldermen all had full notice of the accident and plaintiff's injuries in their official capacity within ninety days thereafter," "may be construed to charge that the mayor, clerk and council were in fact presented with the notice so served on the mayor" is beyond my comprehension. Neither can I conceive that there is anything ambiguous in the language quoted from the complaint. How can it be said that an allegation that certain persons "had full notice of the accident and plaintiff's injuries in their official capacity" is in any wise ambiguous? There is not the slightest intimation in such allegation that the notice of the injury required by the statute, as a condition precedent to plaintiff's right to maintain the action, had ever been brought before the clerk or the council, or that they had knowledge of its existence. It is said in the opinion that "there is no claim that the city council did not have full or sufficient notice, or that they did not act on it." The very fact that a demurrer was filed to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action in respect to the service of the notice, is essentially a claim that the city did not have full and sufficient notice to make it liable under the statute. Moreover, that which the statute required the plaintiff should do, as a condition precedent to maintain his cause of action, can not be legally excused by the courts, even though the latter should think the requirement harsh or unwise. To do so is to annul legislation and determine the rights of litigants, not in accordance with the law of the land, but as the court thinks the law should be.

I am authorized to state that Mr. Justice Hill and Mr. Justice Garrigues concur in the views I have herein expressed.

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GABBERT, J.

There is an additional reason why the judgment should be reversed. The plaintiff's cause of action is the alleged negligence of the city. In order to maintain his action, unless legally excused, he is required to give the statutory notice. The purpose of this notice is to afford the municipal authorities opportunity to investigate his claim, and take steps to protect the city. It is, therefore, solely for the benefit of the city, and service upon the official designated in the statute may be waived. In my opinion, the complaint alleges facts from which it appears that service of notice upon the clerk was waived.

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[No. 7855.]

## SATISFACTION TITLE AND INVESTMENT COMPANY v. YORK ET AL.

1. PRINCIPAL AND AGENT—*When the Relation Exists*—Defendants had employed one P. to find a purchaser for certain lands. After nearly two years had elapsed, no sale having been effected, a corporation was organized, and P. having become its manager, and having applied to defendants on behalf of the corporation to know if the price previously specified still controlled, defendants listed with him the same, and other lands. Defendants had no knowledge upon this occasion, of the organization of the corporation, nor that P. was acting on its behalf. *Held*, that defendant's ignorance in no manner affected the right of the corporation to recover commissions upon a sale subsequently made, and of which it was the efficient cause.

2. TRIAL—*Questions for Jury*—Where in an action by a land broker for commissions upon a sale alleged to have been induced by him, his employment, as well as whether he was the producing cause of the sale are in issue, such questions are for the jury.

3. BROKER—*Right to Commissions*—A broker who is the efficient cause of a sale may recover his commissions though he had no personal acquaintance with the purchaser and did not present him to his principal.

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*Error to Montrose District Court.*—Hon. SPRIGG SHACKLEFORD, Judge.

Messrs. CATLIN & BLAKE, for plaintiff in error.

Mr. C. J. MOYNIHAN and Messrs. SHERMAN & SHERMAN, for defendants in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

This is an action by the plaintiff in error, plaintiff below, to recover from the defendants in error, defendants below, a commission as broker for the sale of certain of defendants' lands. The defendants were the owners of several tracts of lands including the premises in question. They had, about two years prior to the occurrences upon which the suit was based, listed certain of their lands for sale with one Lincoln Pysher.

Afterward, and on the 24th day of February, 1911, the plaintiff was organized as a corporation and the said Pysher became its general manager. Afterward and about the 1st of March, 1911, Pysher drove out to the house of the defendants and what occurred at that time is better stated in his own language:

"I went out to the York place to revise the list that I already had, and asked her if the old prices she had formerly given me would still be effective, if it would still be all right, and we talked the matter over, I and Mrs. York, and she concluded that instead of just simply listing some of the property, that she had formerly required me to sell, she would add some more to it, and consequently she listed all of her property, at that time for sale with the exception of a small tract between the railroad and the north forty, about fifteen acres. All of her land laying south of the railroad was afterwards sold. $14,000 was the price placed on the land that was sold that lays south of the railroad. She was to pay a commission of 5 per cent. The property south of the railroad was listed with me at that time at $14,000 without the crop. If the crop went

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with the south forty, I was to sell it for an additional $500.00."

Mrs. York was acting for herself and as guardian for her two children. Pysher testifies that afterward and at the earnest request of Mrs. York he made a special effort to sell the property, that he showed the property to numerous prospective purchasers. That among these was a Mr. Nelson, introduced to the plaintiff by his neighbor Julius Krogh, and at that time the plaintiff drove Nelson and Krogh over the premises, and priced the particular lands in question to Nelson, in Krogh's presence. Nelson did not buy, but afterward Krogh advised Pysher that other friends of his were coming to look for lands, and that later a cousin, Peter Krogh, did come. That Pysher asked Julius Krogh if this was one of the persons he had referred to as desiring to purchase lands. That Krogh replied that he was, but that he did not know that he would purchase at that time, but said, "You might show us around, he might buy something if he could find a bargain." Pysher reminded Krogh of the York land which they had examined together with Nelson, and asked him to speak to his cousin about it, and arranged to take the two Kroghs to see it the following morning. Pysher accordingly went to the residence of Krogh the following morning and was advised that the Kroghs had gone to see another tract of land. But was told by Krogh that evening when he again called, that the cousin Peter Krogh had contracted to purchase the York land. Pysher then called up Mrs. York and told her that he claimed his commission and wanted her to so understand before she consummated the sale. Mrs. York declined to discuss the matter with him.

The agreed commission was five per cent. of the purchase price and the land was sold for the listed price of $14,000. The defendant offered no testimony, but at the close of plaintiff's testimony moved for a non-suit, which motion was sustained by the court, and the jury discharged, upon which ruling the case is before us for review. Defendants in error

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have filed no brief, and the reasons for the courts action must be gathered from the language of his ruling as follows:

"The evidence in this case discloses the fact that this man, Lincoln Pysher, had an agreement with the defendant, Lillie T. York, to take her property and attempt to sell it, and that listing, as it is denominated by the witness for the plaintiff in this case, occurred a couple of years ago, or at any rate a long time before the plaintiff in this case, which is a corporation, had any existence under the law. The witness testifies that last spring he had a talk with Lillie T. York, and that he had gone out there and revised his lists, and to ascertain if there were any changes. The conversation with Mrs. York was such that it could not have been anything else than a perpetuation of the old contract, and that any agreement that he made with her was simply an agreement as to his own agency for her; it affirmatively appears that this is the case. Now, the doctrine as to the undisclosed principal as attempted to be applied to this case by the plaintiff, is certainly not applicable; he could not have been an agent for a non-existing company. I hold then that there is no contract existing between the plaintiff corporation and the defendant.

As to the further proposition involved in this case, as to whether the company or Pysher was the procuring cause of this sale, I am constrained to hold that it affirmatively appears from the testimony of Pysher himself, that he was not the procuring cause; he did talk to a cousin of the purchaser, Julius Krogh; he never, according to his own testimony, asked Krogh to do anything; Julius Krogh did go out there and have this talk and made a contract with the defendant in this case, and she sold the property to him, but neither Pysher or the company had ever seen the purchaser, or had any talk with him, and there is no evidence to show that he had even induced this Julius Krogh to influence his cousin to buy it; the evidence shows affirmatively that he intended, himself, to have the interview with him, and to take him out to the ranch and

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show it to him; so the motion for a non-suit will be sustained, and the jury will be discharged from the further consideration of the case; there is no directed verdict."

It appears from this that the court held: 1. That the arrangement between Mrs. York and Pysher on February 24th, 1911, was a continuation of the agreement of two years before, and therefore with Pysher personally, hence the corporation cannot recover; 2. That Pysher did not ask Peter Krogh to purchase the land and did not induce Julius Krogh to influence the purchaser in the matter.

As to the first finding, it clearly appears from the evidence of Pysher, that the listing on February 24th, was a new arrangement, for it contained the inclusion of other lands, and for a fixed price for the tract, with the additional lands, so to be offered. There can be no doubt from the testimony that Pysher was acting at that time for the plaintiff corporation, though there was no mention of this fact to Mrs. York. Neither does it appear that Mrs. York knew of the existence of the corporation. But this could in no sense affect her interests or her rights in such case. Neither can it affect the right of the real party in interest to recover.—*Parker v. Cochran*, 11 Colo. 367, 31 Cyc. 1599.

As to the second reason given by the court for his action in sustaining the motion for a non-suit, it is well settled that as to whether or not the plaintiff was the efficient means of bringing the seller and the purchaser together, was for the jury and not for the court. 19 Cyc. 286, 287.

In fact, both questions upon which the court determined this case should have been submitted to the jury under proper instructions, for they clearly involve findings of fact and not conclusions of law. It is the rule of law in this jurisdiction: That is to say he must have found and produced a person who was ready, willing and able to purchase the property which he was engaged to sell, at the price and upon the terms and conditions fixed by his employer, and must make it appear

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that he was the efficient agent, or procuring cause of the sale, and that the means employed by him and his efforts resulted in this sale."—*Chaffee v. Widman,* 48 Colo. 34.

In order to entitle the plaintiff to recover it is not necessary that the broker should know the purchaser, or that the latter should be introduced by the broker to the owner. The fact of employment being conceded and with no dispute as to the price of the lands or the amount of the commission, it is sufficient if the broker shows that he was the moving cause of sale.—*Leonard v. Roberts,* 20 Colo. 88; *Leach v. Clemons,* 14 Colo. App. 45; *Williams v. Bishop,* 11 Colo. App. 378.

The judgment is reversed and the case remanded.

*Reversed and Remanded.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES, concur.

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[No. 7866.]

## AYRES ET AL. v. WALKER.

**ALTERATION OF WRITING—*Filling Blanks—Effect*—A promissory note, blank as to the rate of interest and the time from which interest is to be computed, is subscribed by the principal maker, and the sureties, and delivered by the principal to the payee named therein. The payee, without authority of the sureties, fills the blanks and advances money thereon to the principal. The alteration is a material one, and the instrument is thereby avoided.**

*Error to Pueblo District Court.*—Hon. C. S. ESSEX, Judge.

Mr. W. S. PALMER and Mr. LYMAN I. HENRY, for plaintiffs in error.

Mr. W. O. PETERSON, for defendant in error.

Mr. JUSTICE SCOTT delivered the opinion of the court:

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In this case suit was instituted by the defendant in error as plaintiff below, on a promissory note in words and figures as follows:

"$300.00 Pueblo, Colo., Nov. 4, 1910.

On or before one year after date for value received, I, we or either of us, promise to pay to the order of C. C. Walker, Pueblo, Colorado, three hundred no-100 dollars. To bear interest at the rate of two and one-half per cent. per month from date until paid. And further hereby agree that if this note is not paid when due to pay all costs necessary for collection, including ten per cent. for attorney's fees.

Interest payable monthly.

No. 1 due.....

WILL W. WALTER,
CHAS. W. AYRES,
C. W. WALTER."

The defendants admitted the execution of the note in the amount named, but alleged that when the note was signed by the defendants, Chas. W. Ayres and C. W. Walter, the rate of interest, term of interest payment and time from which the interest should date, were in blank, in other words, that when these defendants signed the note it read as follows:

"$300.00 Pueblo, Colo., Nov. 4, 1910.

On or before one year after date for value received, I, we or either of us, promise to pay to the order of C. C. Walker, Pueblo, Colorado, three hundred no-100 dollars. To bear interest at the rate of ..... per cent. per..... from ..... until paid and further hereby agree that if this note is not paid when due to pay all costs, necessary for collection, including ten per cent. for attorney's fees. Interest payable .....

WILL W. WALTER,
CHAS. W. AYRES,
C. W. WALTER."

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The three defendants testified in substantial conformity with the allegations of the answer, including want of knowledge upon the part of the plaintiffs in error, of the change, or consent to the change, made by the filling in of the blanks as appears by the form of note sued on. The plaintiff testified that the note was as appears in the complaint, when presented for signatures.

The defendant Will W. Walter, principal obligor, took the note to the sureties Chas. W. Ayres and C. W. Walter, and after procuring their signatures, presented it to the plaintiff and received the money represented by its face. The defendant, Will W. Walter, testifies that the rate of interest and other matters represented by the blank spaces were filled in by the plaintiff after it was returned with the signatures of the other defendants. The plaintiff denies this statement. The defendant Will W. Walter pleaded a discharge in bankruptcy and was dismissed as a defendant.

Over the objection of the defendants the court instructed the jury in substance as follows:

Instruction 5 instructs the jury that if they find from the evidence that at the time Ayres and C. W. Walter signed the note there were no unfilled spaces and that the same was filled in and complete at that time, then the jury should find in favor of the plaintiff and against Ayres and C. W. Walter, 'for the face of the note; that is, $300 plus interest at two and one-half per cent. per month from Sept. 15, 1911, including an attorney's fee of ten per cent.; that is a verdict for the sum of $396.25.

Instruction 6 was to the effect that if the jury find from the evidence in this case that there were in the note in question at the time same was signed by Chas. W. Ayres and C. W. Walter, the unfilled blank spaces as alleged, then the presumption of law is that the note drew interest at eight per cent. per annum from maturity; and if you so find your verdict will be in favor of the plaintiff and against defendants, Chas. W. Ayres and C. W. Walter, for the face of the note; that is $300

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plus interest at eight per cent. per annum from Nov. 4th, 1911, including an attorney's fee of ten per cent.; that is a verdict for the sum of $344.40.

The jury returned a verdict in the sum of $344.40, thus in effect under these instructions, finding for the defendants in their contention, that the note as signed by them did not contain the rate of interest, date from which it should run, nor the period of interest payments. This is conceded by counsel for defendant in error, who says in his brief, "under the verdict and judgment below, the plaintiffs in error were held liable on the note in the form they claim it was when they signed it."

The contention of plaintiffs in error, is that the alteration of the note by the plaintiff, in the manner suggested, invalidated the whole contract as to the defendants Chas. Ayres and C. W. Walter. Our statute provides that:

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Sec. 4587, Rev. Stat., 1908.

The statute likewise provides that any alteration as to date, rate of interest or time or place of payment is such a material alteration. Sec. 4588, Rev. Stat., 1908.

It will be seen that this note was not in the hands of a holder in due course, but was in the hands of the original payee, who brought the suit, hence, under the statute, if the note was altered after being signed and after coming into his hands, without the consent or notice of the appealing defendants, it was as to them void, and the jury should have been so instructed.

This is an old and wise provision of the law, and the reason for it is apparent when we consider the absoluteness of

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custody and control by the payee or holder, and the utter helplessness to prevent an alteration in the case of the maker in that respect. And so the law has provided as a penalty, not only of criminal liability, but a forfeiture and cancellation of the obligation in its entirety.

This question was determined in the case of *Hoopes v. Collingwood,* 10 Colo. 107, wherein the facts were almost identical with those presented here, except that the alteration was made by the endorsee of the note. In that case the court said:

"1. Does such a note, with such blanks, thereby carry authority to the purchaser thereof to fill the blanks in the manner here shown, whereby the rate of interest is changed from the legal rate, viz., ten per cent. per annum, to twenty-four per cent. per annum? We answer not.—*Rainbolt v. Eddy,* 34 Ia. 440; *Bank v. Stowell,* 123 Mass. 196; *Holmes v. Trumper,* 22 Mich. 427.

2. Is the note vitiated and avoided by such change in its terms by the purchaser, without the knowledge or consent of the makers? We answer that it is, for thereby it ceases to be the promise they made, and the effect is the extinguishment of the promise.—1 Greenl. Ev. sec. 565; *McGrath v. Clark,* 56 N. Y. 35; *Inglish v. Breneman,* 5 Ark. 377; *Coburn v. Webb,* 56 Ind." See also 2 Cyc. 154 and authorities cited.

The instructions of the court complained of an hereinbefore referred to, were erroneous. The judgment is reversed and the case remanded for further proceedings in accord with this opinion. *Reversed and Remanded.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE GARRIGUES concur.

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[No. 7950.]

# THE PEOPLE EX REL. v. THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT ET AL.

1. PROHIBITION—*Not a Writ of Right*—Whether it shall be granted rests in the sound discretion of the court.

2. ——*Diligence Required*—One who acquiesces in a judgment or order will not afterwards be allowed a writ of prohibition to restrain action thereunder.

On the 7th of February, A. D. 1911, in the district court, receivers were appointed for a corporation alleged to be possessed of valuable properties, but largely indebted and without ready means to discharge pressing debts, or accumulating taxes, or to operate its property. The bill upon which the appointment was made alleged not only these matters, but that if creditors were allowed to proceed with their actions, dissipation and waste of the corporate assets would result, to the injury of both creditors and stockholders. On the first of March succeeding, other creditors and stockholders applied for leave to intervene in the cause, alleging that the receivers were appointed without notice, that the attorney who assumed to appear for the corporation and consent to the appointment, acted without authority, and that the bill was without equity. This application was denied on March 11, A. D. 1911. No exception was taken to the ruling, and no further action had until January 6th, A. D. 1912, when the same creditors and stockholders presented a second petition for leave to intervene, setting forth their first petition and the action taken thereon, reiterating its statements, and alleging that in denying such original application the court was influenced by representations made at the time of the receiver's appointment, that a person named would shortly raise the means necessary to pay the pressing liabilities of the company, and enable it to operate its properties, and become a going concern; that none of these assurances had been carried out; that the person making them was without means of his own, and unable to raise money from other sources, and that the appointment of the receivers was procured merely to harass the creditors and stockholders of the company, and constrain them to part with their demands, and their shares at a great sacrifice. Delay in the presentation of the second petition was excused by the suggestion that the petitioners had been advised that it would be improper and unavailing for them to renew their application until a reasonable time had elapsed for the fulfillment of the promises and assurances made to the court as above stated. This petition was denied on January 6th, A. D. 1912. On the 22nd of January, 1913, application was made in this court, for a writ of prohibition, restraining the district court from further proceeding

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**under the order appointing the receivers, and for other relief. *Held*, that the delay intervening between the denial of the first petition and the presentation of the second was an acquiescence in the appointment of the receivers, and that such acquiescence, and the long delay succeeding, before the application of this court, were sufficient to warrant the court in refusing to enter into the merits of the controversy, by the writ of prohibition.**

**3. INTERVENTION—*Petition Denied—Writ of Error*—The denial of a petition for leave to intervene in a pending cause is a final judgment to which error lies.**

*Original application for writ of prohibition.*

Mr. A. M. STEVENSON and Mr. L. M. GODDARD, for petitioners.

Mr. CHARLES W. WATERMAN and Mr. CALDWELL MARTIN, for respondents.

Mr. JUSTICE HILL delivered the opinion of the court:

This is an original application for a writ of prohibition to restrain the district court of San Juan county and the Honorable Charles A. Pike, judge thereof, from proceeding further in a certain cause pending in said court, and to compel the court to quash, set aside and annul certain orders appointing receivers therein, and authorizing receivers' certificates of indebtedness. The order and rule to show cause were issued, and return made thereto wherein the respondents challenge the sufficiency of the petition, etc.; it also, raises the question of acquiescence and laches upon behalf of the petitioners.

Upon February 7th, 1911, E. E. Dick, as plaintiff, filed in the district court of La Plata county his complaint against The Green Mountain, Mining and Milling Company, as defendant. Among other things this complaint states, that the defendant is the owner and in possession of sundry mining properties, etc., in San Juan county of a value in excess of $1,000,000.00; that it has heretofore been engaged in operating these properties, etc.; that it has issued $600,000.00 of interest-bearing bonds, secured by mortgage upon its property; of

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these $160,000.00 is an outstanding indebtedness; that $440,000.00 of the bonds are held as collateral security for the payment of $290,000.00 of other indebtedness of the defendant; that it has a floating indebtedness of $460,000.00 now due and payable; that six months' interest on the $160,000.00 bonds aforesaid is past due and unpaid; that the plaintiff is the owner of 120 shares of the capital stock of the defendant; that the defendant is indebted to him in the sum of $560.00 for salary as secretary and treasurer; that in addition thereto he holds two notes of the defendant for $2,000.00 which are long past due; that defendant is wholly unable to pay the principal or interest on its bonds or any of its indebtedness as the same matures or has matured; that its property is subject to judgments, executions and attachments at the hands of its numerous creditors; that suits have been brought against it by its creditors in Pennsylvania and Colorado; that if receivers are not appointed, the defendant will be subject to a multiplicity of suits and litigation of various sorts in Pennsylvania, Colorado and elsewhere; that its assets will be dissipated and sacrificed; that certain creditors will secure a preference over others; that its property will be taken upon execution and sold piecemeal; that its property will be greatly dissipated, diminished, impaired and wasted; that if the interest on its bonds be not paid the holders will declare default, and proceed to foreclose their mortgage; as a result the bondholders will secure a preference over the unsecured creditors and all the property will be consumed in the satisfaction of the indebtedness secured by the bonds; that if the assets of defendant are not sacrificed by forced sales in the threatened litigation, they are far in excess of the liabilities of the defendant, and if properly administered will pay all its debts, and leave a substantial residue for its stockholders; that the procuring of a comparatively small amount of money will permit the operation of the mines and plant of the defendant; that if defendant is enabled to again resume operation of its property, it can eventually

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discharge and pay its indebtedness without sacrifice of its property. This is followed with detailed statements how this can be accomplished. It is alleged that the taxes for 1910 are unpaid, and the result which will follow if not arranged for. It states that the plaintiff is informed and believes that the defendant will be able to procure funds sufficient to accomplish the results above indicated, if given a reasonable period to do so before there is foreclosure and forced sales of its property. This is followed with detailed information as to how this is to be done, with the further allegations that unless the court assumes jurisdiction and appoints receivers the claims of all unsecured creditors will be ultimately lost, as well as great damage to the secured creditors and stockholders. It is also alleged, that in a United States court in Pennsylvania receivers have been appointed and have proceeded to take charge of the assets of the company in that state; that in that action the company by answer admitted the allegations of the bill which were, to a certain extent, the same as those contained in this complaint. The prayer is for judgment against the defendant for $2,512.00 and interest, for the appointment of receivers with detailed authority, and that the officers and agents of the company be compelled to turn the property over to them, and that all creditors be enjoined from instituting suits or attempting to enforce collections, other than through the receivership, etc., and for general relief.

Upon the same day the defendant company purported to file its answer in which it admits the truth of the allegations contained in the complaint, and consents to the appointment of receivers. Three receivers were appointed upon the day the complaint and answer were filed; they therafter qualified and took possession of the property and it appears have thus continued under the orders of the court.

Upon February 8th, 1911, the court, upon its own motion, transferred the cause to San Juan county, it appearing that it was one affecting both real and personal property situate in that county.

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On March 1st, 1911, these petitioners, Joseph G. Butler, Jr., and C. A. Ferguson, tendered for filing in the action above referred to their verified petition for intervention wherein they allege, among other things, that they were not served with notice, and had no knowledge of the appointment of the receivers until February, 1911; that the Pennsylvania court was without jurisdiction in the premises, and that the appointment of receivers there, as well as here, was without notice, except to one DeArmit, who claimed to be the president of the defendant company, and one Ralph Hartzell, attorney, who assumed to file an answer for the defendant; that the company is indebted to Butler in the sum of $23,625.65 with interest upon certain notes, describing them, also, an additional $5,000.00 furnished as a loan which is long past due; that he is a large stockholder, owning 204,000 shares; that Ferguson is a creditor and upon January 21st, 1911, obtained a judgment for $3,500.00 with interest, against the defendant in the courts of Pennsylvania; that Ferguson is a stockholder owning 135,420 shares; that a large majority of the stockholders and creditors are opposed to the appointment of receivers either in Pennsylvania or Colorado; that it appears on the face of the bill in this suit that this court was without jurisdiction to appoint receivers; that there is no equity in the bill (this is followed with detailed reasons attempting to thus show); that Ralph Hartzell purporting to answer for the defendant had no authority to represent it; that there was no proper notice given to the company nor any notice given to the stockholders, creditors or bondholders; that the complaint fails to state a cause of action; that the appointment of receivers is not in the interest of the stockholders, etc.

The prayer is for permission to intervene and become defendants, to include such other stockholders and creditors as desire to join them, that they may be permitted to file a motion to vacate the order appointing the receivers, to demur to the bill, or otherwise plead.

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This petition was duly considered by the court and after arguments ,on March 11th, 1911, the court declined to allow the petitioners to intervene. No exceptions appear to have been taken to this ruling, and nothing further appears to have been attempted by these petitioners until January 6th, 1912, when they presented to said court another petition for intervention in said action. This petition sets forth a copy of the former one with a statement of the disposition thereof. In addition to the allegations contained in the first petition, which are reiterated in the second, other matters are alleged, some of which are, that the decision of the judge in refusing to allow the petitioners to intervene upon their former petition was largely based upon the fact that at the time of the appointment of receivers it was represented to the judge if he appointed the receivers that one William P. DeArmit and his associates would, within a very short time, raise the necessary funds to pay the pressing debts of the defendant company, and also sufficient other money to develop and improve its properties, and to enable it to work and operate them and make it a going concern; that upon account of these promises the judge appointed the receivers; that more than ten months have elapsed since the appointments, but that no part of the pressing, or any debts of the company have been paid; that no improvements have been made upon the property since that time, and in fact nothing has been done to relieve the company from its financial embarrassment, or to put its property in a condition to work and operate, but, on the contrary, a large amount of additional indebtedness has been incurred since the appointments; that the petitioners have used every diligence to intervene; that after the decision refusing to permit the petitioners to intervene, they were advised and verily believe that it would not be proper, and in fact would be unavailing, for them to attempt to intervene until a reasonable time has elapsed for the fulfillment of the promises said to have been made on behalf of DeArmit as hereinbefore stated; that when

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the representations were made to the judge, as aforesaid, that the indebtedness of the defendant company would be paid or substantially reduced, and provisions made for working the properties, etc., the said DeArmit was then and has ever since been insolvent, and was and is entirely without means of his own, and without ability to raise money from other sources, for the use of the defendant, or in fact to do anything of a substantial character to relieve the defendant company of its financial embarrassment; that Dick was an employee of DeArmit, and sustained the closest confidential relation to him; that Dick was and is one of the smallest creditors; that Dick, DeArmit and others conspired and confederated together for the purpose of obtaining the appointment of receivers, in order to prevent the creditors from collecting their just claims, so that Dick, DeArmit and others might, through said receivers, obtain more complete control of the property of the defendant, for the purpose of harrassing and annoying the creditors, and the majority of the stockholders, to the end that the creditors would compromise their indebtedness against the defendant company for a small per cent.; and that the stockholders would part with their stock for a trifling amount, and thus enable the said DeArmit, Dick and others in such conspiracy to obtain ownership of the property without paying any substantial amount therefor; that Dick, DeArmit and others, claiming to be the directors of the company, prior to the appointment of receivers, attempted to reduce the capital stock from $3,000,000.00 to $1,250,000.00. Then follows a history of this transaction whereby it appears all the stock of the corporation was turned over to certain trustees, in which manner it is alleged that DeArmit and his associates had controlled the affairs of the company against the interest of its creditors and those owning a majority of its stock.

Other allegations are set forth pertaining to the history of the defendant company and the alleged fraudulent acts of Dick, DeArmit and others in connection with its management. The prayer is the same as in the former petition. The

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court, upon January 6th, 1912, after considering the application and hearing the arguments of counsel, ordered that the application and petition be denied. Thereupon, the petitioners offered for filing a motion to vacate and set aside the order made January 7th, 1911, appointing receivers. The court refused to allow this motion to be filed. Mr. Ferguson then presented for filing a demurrer to the complaint. This was likewise refused. The petition praying for the writ of prohibition was filed in this court upon November 22nd, 1912.

The contentions of the petitioners are that while the court had jurisdiction to entertain the action proper, which they claim is a suit upon notes, and for services rendered, it was without jurisdiction over the property of the corporation attempted to be covered in that portion of the petition setting forth alleged reasons for the appointment of receivers; that if this position is wrong and the court had jurisdiction to pass upon the question, that when the allegations of the petition are considered, it fails to disclose facts sufficient to justify the court in its appointment of receivers and in so doing it exceeded its legitimate powers; that by presenting their petition for intervention with these reasons therein stated they gave to the trial court an opportunity to correct its erroneous ruling in this respect, which it declined to do, and that this is sufficient to give them the right to petition this court for the writ of prohibition therein, although they have not yet become parties to the action, and that they have no plain, speedy and adequate remedy at law to protect their rights in the premises.

This court has universally held that a writ of prohibition is not a writ of right, but rests in the sound discretion of the court.—*Leonard v. Bartels,* 4 Colo. 95; *People ex rel. v. District Court,* 6 Colo. 534; *McInerney v. City of Denver,* 17 Colo. 302; *People ex rel. v. District Court,* 19 Colo. 343; *People ex rel. v. District Court,* 21 Colo. 251; *People ex rel. v. District Court of Lake Co.,* 26 Colo. 386.

For the reasons hereinafter stated, we are of opinion that upon account of the acquiescence and laches of the petitioners,

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this court ought not to entertain this application. This makes unnecessary any consideration of the many intricate questions presented.

It will be observed, that the receivers were appointed February 7th, 1911; that upon March 1st, same year, the petitioners tendered for filing their first petition of intervention. This was denied upon March 11th, following. Nothing further was done by them until January 6th, 1912, a period of approximately ten months, when they filed another petition to intervene, wherein they set forth, in substance, as excuses for delay in its presentation that they have abandoned any right to stand upon their former petition, and acquiesced in the appointment of the receivers for the reason, as they allege, that it was represented to the court at the time of the appointments that within a very short time funds would be raised by those who desired the appointment of receivers sufficient to pay the pressing debts of the defendant company, and also to develop and improve its properties and to enable it to work and operate them and make its plant a going concern, and that the court's decision in refusing to allow them to intervene was largely based upon these promises, but that during these ten months nothing had been done in this respect to relieve the company from its financial embarrassment, or to put its property in a condition to work and operate, but; on the contrary, a large amount of additional indebtedness had been incurred, etc. In other words, they said to the court that while we did not approve of the appointment of receivers and thought you were without jurisdiction in so doing, and we thus stated in our first petition for intervention, yet upon account of the promises made to you that the emergency debts of the corporation would be paid, and sufficient other funds arranged for to make the defendant's business a going concern, we acquiesced therein, and said nothing further for a period of ten months in order to see if such arrangements would be carried out by that faction of the stockholders of the defendant who desired and secured the appointment of the receivers. To put it in another

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way, it was to say that if things work out all right, and to our advantage, we acquiesce in the appointment of receivers; but if they go wrong (although we have not said so, and will not until it is necessary to act), it is our intention when it is thus ascertained, to again object to the appointments, and challenge the jurisdiction of the court to make them. Such action upon behalf of the petitioners was unquestionably an acquiescence in the appointment of the receivers and in their handling of the property during the ten months following their appointment.

The second petition for intervention was presented January 6th, 1912, and by the court acted upon and refused the same day. The petition for the writ of prohibition was filed in this court November 22nd, 1912. It fails to give any excuse or reason why it was not applied for until over ten months after the district court for the second time had refused to grant the relief prayed for.

Regardless of whether the case is of such importance as the petitioners claim, we are of opinion that their actions as above stated, during the ten months after these appointments were made, present a case of acquiescence during that period and that their delay for the ten and a half months thereafter, before making application here for the writ of prohibition, presents a case of laches and when both are considered they are sufficient to justify this court in refusing to consider the questions raised pertaining to the merits of the controversy under its extraordinary jurisdiction by writ of prohibition.

While it is claimed that the petitioners (by presenting their petition of intervention) gave to the trial court an opportunity to pass upon the question of its jurisdiction to appoint receivers in an action to which the petitioners were not then parties (a question unnecessary to determine); it is conceded the only thing that the court did pass upon was their right to intervene. Its refusal was such a final judgment against them to which a writ of error will lie.—*Henry v. Travelers' Insurance Co.*, 16 Colo. 179; *Curtis v. Lathrop*, 12 Colo. 169; *Limberg v. Higginbotham*, 11 Colo. 316; *Harman*

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*v. Barhydt,* 20 Nebr. 625; *First Nat'l Bank v. Gill & Co.,* 50 Iowa 425; *Nat'l Distilling Co. v. Seidel,* 103 Wis. 489.

Had a writ of error been promptly sued out upon the court's first refusal to allow the petitioners to intervene, the matter could probably have been reached and disposed of in the regular manner by this time. Whether the petitioners had the right to present a second petition to the court, raising the same contention, with the further statements that the appointment of the receivers had not proven successful or accomplished what was promised, is unnecessary to determine. They elected, as they say, after the first refusal, to take their chances, and had the appointments brought the results alleged to have been promised, it appears they would have been satisfied and continued to acquiesce in the jurisdiction of the court, but inasmuch as they did not work out as they alleged was promised, they now desire to have the question determined in this extraordinary manner. Under such circumstances the application ought not to be entertained.

For reasons stated the alternative order and rule will be quashed and the writ denied.

*Application denied.*

Decision *en banc.*

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[No. 6551.]

## NUTT v. DAVISON.

1. BAILMENT—*Negligence of Bailee Presumed*—Where goods are delivered to bailee in good condition, and are returned injured or in defective condition, or not at all, a presumption of negligence on the part of the bailee at once arises, and the burden is upon him, if he would exonerate himself, to show due care.

2. ——*Directions of Bailor*—The bailee of live stock complies with the instructions of the bailor, as to the place of their keep; but these instructions are given upon the representations of the bailee, the bailor having no acquaintance with the locality. Loss ensues by reason of the unsuitableness of the place. The bailee is liable.

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**If in such case the pasture where the animals are at first kept, by direction or consent of the bailor, becomes unsuitable by reason of a change of condition, it is the duty of the bailee to either take such action as a reasonably prudent person would to preserve the animals in unimpaired condition, or to promptly inform the bailor of such change of conditions.**

**3. INSTRUCTIONS—*Conflicting—Not Warranted by Evidence—Shifting Burden of Proof*—Instructions which are directly in conflict, upon a material question, constitute fatal error.**

**So instructions which are directed to a supposed state of facts not established by the evidence.**

**Or an instruction which devolves upon one party the burden of proof which the law imposes on the other**

*Error to Montrose District Court.*—Hon. SPRIGG SHACKLEFORD, Judge.

Mr. S. S. SHERMAN, for plaintiff in error.

Messrs. BELL, CATLIN & BLAKE and Mr. P. W. MOTHERSILL, for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

This is an action brought by a bailor against a bailee in whose exclusive and immediate possession the property bailed, or a portion thereof, suffered injury and was destroyed. The judgment was in favor of the bailee and the bailor brings the cause here for review. The subject of bailment was approximately four hundred head of cattle, entrusted to the bailee for a fee, to be cared for during a specified time, upon a designated cattle range, and at the expiration of the term returned to the bailor. The greater portion of the cattle were received by the bailee April 1st, and the remainder May 20th. Between these dates at least ten of the first herd had died, of which fact the bailee had knowledge, but did not apprise the bailor thereof when he received the second herd, though at that time he asked of the bailor, and received of him personally, a check in part payment for his services under the contract of bailment. During the first sixty days of the term ninety-seven head of the

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cattle died. It was the contention of the bailor that the cattle died from starvation and exposure by reason of confinement in a pasture, at a high altitude, not sufficiently supplied with food and shelter, while the defendant claimed they were placed and kept therein temporarily by direction of the plaintiff.

Over the objection and exception of plaintiff the court instructed the jury, in effect, that before the plaintiff could maintain his cause of action and recover against the defendant, he must show the cause of the death of the cattle and that they died only by reason of the negligence of the bailee, and of what that negligence consisted. We think the court erred in so instructing the jury. While the authorities are in conflict, the greater weight thereof and the better reason place the duty upon the bailee to satisfactorily explain the non-delivery of the thing bailed, or its delivery in an injured condition such as only culpable carelessness would probably have caused.

The general rule is, that in cases where the evidence shows that the property was delivered to the bailee in good condition and returned damaged, or not at all, the presumption of negligence on the part of the bailee instantly arises, making a *prima facie* case in favor of the bailor, and thereupon the bailee is under the necessity, if he would escape liability, of showing that the damage or loss was not due to his negligence. This may be done, *inter alia*, by showing that he exercised a degree of care, under all the facts and circumstances, sufficient to overcome the presumption of negligence.—*Union Pacific R. R. Co. v. Stupeck*, 50 Colo. 151; Schouler's Bailments and Carriers, (3d Ed.), sec. 23; 5 Cyc., p. 217; 3 Am. & Eng. Ency. of Law, (2d Ed.), p. 750; *Funkhouses v. Wagner*, 62 Ill. 59; *Higman v. Camody*, 112 Ala. 267.

The rule rests upon the consideration that where the bailee has exclusive possession, the facts attending loss or injury must be peculiarly within his own knowledge. Besides, the failure to return the property, or its return in an injured condition, constitutes the violation of a contract, and it de-

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volves upon the bailee to excuse or justify the breach. A clear summary of the law, as to the liability of the bailee for loss or injury to the thing bailed, is found in a note to section 23 of Schouler's Bailments and Carriers, *supra,* where it is said:

"Admitting the danger of wide generalizations on this subject, and granting the force of special circumstances in each case, we may perhaps fairly reach these conclusions: (1) That the bailor who charges his bailee with losing or injuring the thing bailed to him, must make out his *prima facie* case; that is, he must show the creation of the particular bailment in fact, and the delivery on his own part of the specified thing in due condition, with corresponding acceptance by the bailee; also, the bailee's default of final delivery over, or else the final delivery of the thing in unsuitable condition, as the case may be. And whatever might obstruct a *prima facie* showing to this point, and justify an inference that the thing was injured by himself or his agents, or by his or their participation in the mischief, or that its inherent qualities would naturally have developed the mischief,—all this the plaintiff must overcome to make out his case. (2) The *prima facie* case being thus made out as claimed, showing (a) that the property bailed for a certain purpose was not delivered back or over at all by the bailee as contemplated, or (b) that when delivered over it was found so damaged that probably the bailee or his agent caused the injury, the inference is deducible that the bailee is to blame and must answer. And now it rests upon the defendant bailee to explain the loss and exonerate himself; which he may do by showing (a) that the loss or damage was due to some special cause which ought specially to excuse him; or (b), more generally, that he, the bailee, was not culpably negligent. * * * (3) But if the bailee, under such circumstances, shows some cause of loss or damage to the thing, such as ought legally to excuse him, he need not go further and prove affirmatively that no negligence on his part operated in producing that cause; but may rest upon a showing which, on the face of it,

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leaves him sufficiently exonerated. The burden now shifts back to the plaintiff bailor, who is to overcome, if he can, the bailee's *prima facie* exoneration."

Moreover, the instruction under consideration is in conflict with Instruction No. 3, wherein the duty of overcoming the presumption of negligence, arising from the failure to return the property, was properly placed upon the bailee. Those instructions were upon a material point in the case. The latter stated a correct principle of law applicable to the facts of the case. The former misdirected the jury in that respect. This constitutes reversible error, as it is impossible to determine by which instruction the jury were guided in arriving at their verdict. When we bear in mind that the bailee, according to his own contention, had the immediate possession and control of the cattle, in a particular and limited space, and the great number that died within so short a period after the bailee received them, it is evident that the duty devolved upon the bailee to come forward and show that the death of the cattle arose from no fault of his. Under such circumstances the fact of death alone would hardly be a satisfactory explanation of the non-delivery. It might be otherwise if the number of deaths was not excessive.

The jury were likewise instructed that the bailee would not be responsible for the place where he kept, or the manner in which he handled the cattle, if he obeyed the directions of the bailor in that respect. The facts of the case did not warrant the instruction. The bailor claimed that the cattle were to be kept upon a particular range, and the bailee, while admitting that to be the contract generally, claimed that by express direction of the bailor the cattle were to be kept in a pasture until they became accustomed to the locality. The bailor had no knowledge of the pasture or the food supply therein, while these matters were all within the knowledge of the bailee. Moreover, according to the bailee, the bailor had given such directions upon the representation by the bailee that the pas-

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ture was a suitable place, supplied with sufficient food in which to properly keep the cattle. Under these circumstances, the law imposed upon the bailee the duty of exercising that degree of care in respect to the property which a man of average prudence and diligence would bestow on his own property under like conditions and circumstances, and which the law denominates "ordinary care." The care thus required is illustrated in Schouler's Bailments and Carriers, section 137, as follows:

"Let us take, for example, a case by far the most familiar under this head to English and American courts, namely, that of a horse hired for use. Now, unless the bailee took the animal for too short a time, or under a special arrangement whereby the bailor was to look after his own property, he ought to provide the creature regularly with proper food and drink, afford due shelter and repose, and, in general, take reasonable heed that the animal, while resting, is so fastened up that it may not readily run away or be stolen. While putting the horse to active use he should not harness carelessly, overload, overdrive, be heedless of what he perceives to be the creature's frailties, nor fail to supply, prudently, wants essential to its health and good condition. If disease or bruise be discovered during the bailee's term, he should be discreet in its treatment, and in extremity call in some farrier or expert; or else informing his bailor promptly, throw the responsibility, as he may generally do, upon the owner. He should not take dangerous risks of travel. During his whole term of the use the bailee ought to act honorably, humanely, and with such reasonable regard for preserving the animal's value unimpaired as from prudent men might be expected."

Were we to assume that the pasture, when the cattle were first placed therein by directions from the bailor, was supplied with sufficient food and was a proper place in which to keep them until they had been accustomed to the range, nevertheless, if it became apparent to a reasonably prudent person that

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the subsequent condition of the pasture, by reason of snow, the lack of food or other causes, rendered it an unfit and improper place in which to keep the cattle, it thereupon became the duty of the bailee to take proper action and precaution, such as a reasonably prudent person would taken under like circumstances, to preserve the cattle unimpaired, or inform the bailor promptly of the changed conditions and thereby place the responsibility upon the latter.

We can not commend the complaint as a model pleading. It contains much surplusage, and many allegations are found therein that should properly be embodied in a replication. However, this does not remove the prejudice arising from the giving of erroneous, inconsistent and conflicting instructions. If all the facts of the case and the presumptions arising therefrom, show that the loss of the cattle was due to some special cause which ought specially to excuse the bailee, or that the latter was not culpably negligent, the alleged cause of action fails and the plaintiff can not recover; otherwise, he can, the bailment and loss being admitted. Under such circumstances it would be wholly immaterial as to which of the parties furnished the proof. But that is a different matter from telling the jury that the proof of certain facts devolve upon the plaintiff when the law presumes their existence without proof, unless the contrary is shown. The plaintiff was undoubtedly under the necessity of establishing his case by a fair preponderance of the evidence, but he was not called upon, under the facts and circumstances of this case, to assume the burden placed upon him by the instructions. The judgment is reversed.

Decision *en banc*.

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[No. 6764.]

## HARRISON, ADMINISTRATOR, v. DENVER CITY TRAMWAY COMPANY.

1. STREET RAILWAY—*Damage to Private Property*—Under sec. 11 of art. XV of the constitution, and sec. 5420 of the Revised Statutes, those who by license of a city, construct a railroad upon the streets thereof, stand, as to any liability to make compensation for private property taken or damaged, in the place of the city.

2. CONSTITUTIONAL LAW—*Private Property Taken for Public Use*—A physical taking of private property for public use need not be shown in order to entitle the owner to compensation; but it must appear that some right, or interest pertaining to the property has been destroyed or impaired, before an action can be maintained. The right disturbed may be public or private, but it must be a right enjoyed in connection with the property, not shared with the public generally, a right which gives it an additional value and by the disturbance of which the property itself is damaged.

A municipality may devote its streets to all those ordinary and necessary uses to which streets are usually subjected, and to such local uses and means of conveyance as the law-making power may authorize, for the thoroughfares of the entire city. Incidental injuries occasioned by the careful exercise of such rights granted pursuant to this power are *damnum absque injuria.*

As to extraordinary or unusual uses, or unreasonable changes, or injuries to abutting property through faulty or improper construction, the rule is otherwise.

But the proper construction of a street railway, with due regard to existing local conditions, does not so augment the servitude upon the street as to entitle the owner of property abutting thereon, to compensation.

Nor does the mere fact that the tracks of a railway are laid so close to abutting property that vehicles may not stand between them and the sidewalk.

The annoyances, discomfort, and injury, suffered by the abutter from the ringing of bells, and loud and discordant noises produced by the cars in passing over the tracks and around curves, are, excepting as to degree, suffered by the public generally so far as such noises and vibrations are heard and felt, and give no action.

The abutter is, however, entitled to receive at, or remove from his premises, persons or goods, and to have vehicles stand in front thereof upon the street, for the time reasonably necessary for this purpose, even though this may temporarily interfere with the passage of others; and if this right is interfered with he may have redress therefor in a proper action.

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*Error to Denver District Court.*—Hon. HUBERT L. SHATTUCK, Judge.

Mr. R. T. MCNEAL, for plaintiff in error.

Mr. GERALD HUGHES and Mr. HOWARD S. ROBERTSON, for defendant in error.

Mr. JUSTICE WHITE delivered the opinion of the court:

December 9, 1907, Mary V. Macon brought suit against The Denver City Tramway Company for damages claimed to have been sustained as a result of injury to her residence property. The complaint, as amended, alleges, in substance, that since November, 1890, the plaintiff has owned and been in possession of two described lots at the corner of Ogden street and 11th avenue, in the city and county of Denver, together with a two and one-half story brick dwelling house of fourteen rooms, situate thereon, and occupied by her as a residence; that prior to certain acts of defendant, hereinafter set forth, the plaintiff's property was of great value as a dwelling, and the location thereof one of the most desirable in the city; that Ogden street extends in a northerly and southerly direction and is thirty feet wide between the curbs in front of plaintiff's residence; that 11th avenue extends in an easterly and westerly direction; that for ten years prior to 1907 the defendant, under a franchise from the city, operated a double track electric street car line from the business section of the city on 11th avenue to its intersection with Ogden street; thence on Ogden street north by curves to 12th avenue; thence east to Fillmore street; that in the summer of 1907 the defendant, under its franchise, extended its 11th avenue car line from Fillmore street, fifteen blocks eastward, and connected the same with its Fairmount line, and, over the protest of plaintiff, likewise constructed an additional line from its southerly track on 11th avenue, by a sharp curve, into and upon Ogden street to 9th avenue; thence easterly and then northerly through Downing street to 11th avenue, and thence west to an intersection with

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its tracks at 11th avenue and Ogden street; that in front of plaintiff's residence the west rail of defendant's tracks on Ogden street is thirteen feet, at its most remote point, from the curb, and at its least remote point three feet therefrom; that the cars upon said track pass within about thirty-five feet of the front of plaintiff's residence, while the cars on 11th avenue pass within about forty feet of the north line thereof; that since the construction of the extended and additional lines defendant has run, and continues to run, its electric cars past plaintiff's house over such tracks at the rate of forty cars per hour; that prior to the construction of such additional lines south through Ogden street, visitors and others wishing to approach plaintiff's residence, by carriage, automobile, or other vehicles, were accustomed to alight and leave their vehicles in safety in front of her residence; that subsequently thereto they have been deprived of such privilege by the frequency with which cars are operated upon said tracks, and are compelled to alight at the rear entrance on 11th avenue, or elsewhere than at the side-walk in front of her residence; that the frequent passage of cars over the curves of the tracks makes a loud, grinding, shrill and nerve-racking noise, and jars the building, and creates almost a constant rumbling, disturbing sound, accompanied by the ringing and clanging of alarm bells and danger signals; that it is thereby made impossible, the greater portion of the time, for inmates of her home, or visitors therein, to conduct, on the veranda or in the front rooms, conversation in an ordinary tone of voice, or enjoy any form of social intercourse or entertainment during the day or evening, or enjoy undistrubed sleep at night, or occupy the house with any degree of comfort or quietude; that by reason of such things, the rental and selling value of her property has been greatly depreciated to the plaintiff's damage, etc.

A demurrer to the amended complaint was sustained and the plaintiff brings the cause here for review. The demurrer, *inter alia,* challenged the sufficiency of the facts stated to constitute a cause of action.

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Section 11 of article XV of the constitution inhibits the construction of a street railroad in any city without the consent of the local authorities having control of its streets. Section 5420, R. S. 1908, re-enacts, in effect, the constitutional provision, and further declares, substantially, that the consent upon the part of a city to the construction of a street railroad therein shall not operate to relieve or protect those constructing the road, etc., "against any claim for damages to private property, which otherwise, without such consent, might be lawfully miantained against" the persons constructing the road. Section 15 of article II of the constitution declares "that private property shall not be taken or damaged, for public or private use, without just compensation."

Under these provisions of the law, damages to private property, by whomsoever caused and for whatsoever purpose, must be paid; and the defendant, though armed and protected by the power of eminent domain, must respond to plaintiff, if in the construction of its road it has taken or damaged her property.

However, neither the constitutional inhibition against the construction of a street railroad in a city, without the consent of the local authorities, nor the consent of the municipality to the construction of defendant's road, enlarged or lessened the rights of plaintiff. Her rights depend solely upon whether her property has been taken or damaged. The constitutional inhibition recognizes the right of cities to control their streets, while the statutory provision makes it certain, as between municipalities and those constructing street railroads therein, that the latter shall make compensation for private property taken or damaged in the construction of such public works. In other words, as to the liability for compensation for private property taken or damaged, those constructing the road stand in the place of the city. So in the case at bar. If the city of Denver had constructed and operated the road in question, in the same place and manner as has the defendant, and no cause of action

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arose thereby against the municipality and in favor of plaintiff, none has arisen in her favor by reason of the construction and operation of the road by defendant.

A physical taking of plaintiff's property was not essential to a cause of action in her favor, but physical damage thereto, as contradistinguished from personal annoyance or inconvenience, was. It must appear that plaintiff had some right in, user of, or interest pertaining to the property which has been wholly or partially destroyed before she can maintain a cause of action for damages to her property. The right disturbed may be either public or private, but it must be a right which she enjoyed in connection with her property, and which gave to it an additional value, and without which, or as affected by the disturbance, the property itself is damaged. The disturbance of the right or easement may be at a distance from the property injured, but the interference must be with some right held with regard to that property.

As said in *Gilbert v. Greeley S. L. & P. Ry. Co.*, 13 Colo. 501, 506: "Private property must be taken, or private property must be damaged, before a cause of action arises. The damage must be to the property, or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property, and which is not shared with or enjoyed by the public generally."

The injury sustained must be damages to her property, not incidental injuries arising from a careful exercise of legal rights by defendant in a manner that do not invade the legal rights of plaintiff. The principle expressed in the phrase *damnum absque injuria* has not been repealed.—*City of Denver v. Bayer*, 7 Colo. 113; *Denver Cir. R. Co. v. Nestor*, 10 Colo. 403.

For annoyance and inconvenience to owners of private property, arising from the lawful and reasonable acts of another, or the lawful and reasonable use by another, without negligence and without malice, of that which is his, no matter how seriously such acts may depreciate the market price of ad-

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joining property, the owner thereof is without remedy. The fundamental law gives a remedy for private property taken or damaged by requiring payment therefor, but does not extend that remedy to include compensation for personal annoyance and inconvenience suffered by reason of the proper and reasonable operation of either public works or private enterprises.

Moreover, it is certain from our decisions that a municipality in this state may use or authorize its streets to be used for all ordinary and necessary uses to which city streets are usually subjected, and to such further local uses and means of conveyance as the law-making power may have authorized for the streets and thoroughfares of the entire city, and that incidental injuries arising from a careful exercise of those rights are *damnum absque injuria,* but as to extraordinary or unusual uses or unreasonable changes in the street, no such immunity exists.—*City of Denver v. Bayer, supra; City of Denver v. Vernia,* 8 Colo. 399; *Denver Cir. R. Co. v. Nestor, supra; D. & S. F. R. Co. v. Domke,* 11 Colo. 247; *Gilbert v. G. S. & P. L. R. Co., supra; Pueblo v. Strait,* 20 Colo. 13: *City of Denver v. Bonesteel,* 30 Colo. 107; *Leiper v. Denver,* 36 Colo. 110.

As said by Mr. Justice Helm, in his concurring opinion, in *Denver Cir. R. Co. v. Nestor, supra;* "The framers of the constitution, and the people who voted for its adoption, understood that, with this instrument in force, certain injuries suffered by the proprietor of land, through the legitimate and careful improvement of adjoining ground would continue to be wrongs for which the law provides no remedy. So, also, did the convention and the people understand that the abutting lot owner would anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the usual and ordinary uses of a highway; that the city would, from time to time, under the statutory powers conferred, so change and improve the street as to render it more convenient and useful for such purposes; and that incidental injuries in-

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directly resulting to him from such improvements would still be, as they were before the constitution, wrongs without a legal remedy."

And in speaking of the power of the city over its streets, in *City of Denver v. Bayer, supra,* we said: "In determining what changes and improvements are most conducive to (the greater convenience of the public), the council exercises a large discretion. And unless unreasonable changes are made, or injury results to the adjoining premises through the unskillfulness or negligence of those employed, the owner thereof will not be heard to complain, though, in fact, the real value and convenience of his property are diminished thereby; for in purchasing his lot, or in relinquishing the public easement, he is conclusively presumed to have contemplated this power and authority of the municipal government, and is held to have anticipated any injury to his abutting land resulting from a reasonable and proper exercise thereof."

And in *Leiper v. Denver, supra,* many cases are reviewed, and it is held that an "abutting lot owner was bound to anticipate, in making his purchase, that the street would necessarily be occupied by the local public for all the usual and ordinary purposes of a highway, and that the city would, from time to time, so change and improve the street as to render it more convenient for such purposes, and that indirect injuries resulting to him therefrom remain now, as they existed before the constitutional provision was adopted, wrongs without a legal remedy."

When lands are taken or dedicated for a town or city street, the nature and extent of the public right therein are well defined. Such lands are acquired for the purpose of providing a means of free passage common to all the people. When a street is laid out it may be rightfully used throughout its entire extent in such manner as will render it most useful for a highway. And unless unreasonable changes are made therein, or it is subjected to an extraordinary or unusual use,

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or injury results to the adjoining premises through faulty or improper construction, the owner of such premises has no cause of action, though, in fact, the real value and convenience of his property are diminished thereby.—*City of Denver v. Bayer, supra; Pueblo v. Strait, supra; Leiper v. Denver, supra.*

Such changes and uses, if properly made and controlled, do not in any substantial respect destroy the street as a means of free passage common to all the people, nor ordinarily impose thereon an additional servitude. By the reasonable, ordinary, usual and lawful use of a right already fully vested in the public, abutting property is not thereby damaged in a manner that can be made the basis of additional compensation under the constitutional provision.

It is equally well settled that the use of the streets in municipalities for a street railway is one of the ordinary and usual purposes for which such streets and highways may be used, and does not, when properly constructed with due regard to existing, local conditions, augment the burden or servitude upon the street so as to entitle the owner of abutting property to additional compensation.—Cooley on Const. Lim., p. 683; Dillon on Munic. Cor., (4th Ed.), sec. 723; Elliott on Roads and Streets, secs. 698, 699; Booth on Street Railways, secs. 82, 83; Joyce on Electric Laws, secs. 336, 339, 341; *San Antonio, etc., Ry. Co. v. Limburger,* 88 Tex. 79; *Rafferty v. Cen. Trac. Co.,* 147 Pa. 579; *Wagner v. Bristol B. L. Ry. Co.,* 108 Va. 594; *Placke v. Un. Depot R. Co.,* 140 Mo. 634.

On this point, in *Ransom v. Citizens' Railway Co.,* 104 Mo. 375, it is said: "Such a street railway as this, so laid and operated as not to materially impair access to, or the enjoyment of, the adjacent property may lawfully be placed in the public highways of the city, if expressly sanctioned by proper authority. Such a use does not impose any additional burden entitling the owner of adjoining land to compensation; nor can it be justly regarded, at the present day, as any substantial impairment of the public easement or of the private rights of proprietors of land abutting on the street."

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And in *Placke v. Union Depot R. Co., supra,* it is said: "We think it must now be regarded as settled law that an electric street railway laid to grade is not an additional servitude, and does not infringe upon the property rights of those whose lots abut on the street."

Testing the complaint before us by the rules announced, it is clear that no cause of action is stated therein. It contains no allegation that the railway track is above or below the surface of the street, or was in any wise improperly or negligently constructed, or that the road, as a structure, in any way hampers ingress or egress. The gravamen of the complaint is the additional number of cars operated on the line, with the consequent increase in vibration and noise by reason thereof. While it is alleged that at one point in front of plaintiff's residence the west rail of defendant's road is but three feet from the curb, it is not claimed that thereby ingress and egress to plaintiff's property is affected. The inconvenience alleged in that respect arises from "the frequency with which cars are operated upon said tracks," and in no sense from the structure itself. The defendant is not liable for inconvenience of either character, because they are merely incident to the use of the highway for public travel.—*Denver & S. F. Ry. Co. et al. v. Hannegan,* 43 Colo. 122.

The mere fact that street car tracks are laid so close to an abutting owner's property as not to permit vehicles to stand between the tracks and the sidewalk, does not constitute a cause of action in favor of the abutting property owner under the damage clause of the constitution. *Wagner v. Bristol Belt Line Ry Co., supra.* The right to the use of the street is the same after the tracks are laid and the cars running thereon, as it was before. Both he and the defendant company, and likewise the public generally, are entitled to its reasonable use with due regard to the rights of each and all.—*Denver City Tram. Co. v. Wright,* 47 Colo. 366; *Carson v. Central R. Co.,* 35 Calif. 325, 327.

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As said in *San Antonio Rap. Tran. Ry. Co. v. Limburger, supra,* p. 86; "In regard to the matter of access to the property, the question is not whether the construction and maintenance of the railway interferes with the ingress and egress to and from the storehouses, but it is whether such construction and maintenance infringe upon the right of access. It is possible that the operation of a line of omnibuses or drays, or the frequent passage of all kinds of vehicles for the conveyance of persons or property, may seriously interfere with and obstruct the occupants of the buildings in the receipt and delivery of goods; and yet it could not be held that such interference was unlawful. Everyone has the right to the use of the street for the purpose for which it was dedicated, and still in any crowded thoroughfare the driver of any one vehicle almost necessarily interferes with the passage of some other. One can not, however, unreasonably delay to the obstruction of another. So with the case of a street railway. Its passage may be lawfully interfered with by persons lawfully using the thoroughfare for pleasure or for business. It may obstruct the passage of other vehicles; but it can not legally do so, except upon reasonable necessity. The right of the company to move its cars over its track is not superior to the right of another person in the use of the street."

And in *Rafferty v. Central Traction Co., supra,* it is said that if at any time the abutting owner has occasion for the presence of vehicles on the street in front of his property to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose; and if, in such exercise of the right the passage of street cars is impeded, they must wait.

Moreover, the well recognized rule is, that in order for a plaintiff to state a cause of action under the damage clause of the constitution, he must allege facts showing that the injury to him is not only greater in degree but different in kind from that suffered by the public at large. The complaint contains

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no such allegations. The annoyance, discomfort and injury suffered by the plaintiff from the loud and disagreeable noises and vibrations produced by the cars passing over the tracks and around the curves, and the ringing of alarm bells at the place and times in question, are the same, except in degree, as are suffered by the public generally as far as such sounds and vibrations are heard and felt. And as to injury to the ingress and egress to and from the premises, it is not different in kind from that suffered by every other owner of property along the street. The use of the street by any one, in the most careful matter, whether by operating street cars theron, driving teams or automobiles or other vehicles over the same, or traveling upon foot, does to some extent obstruct ingress and egress to and from the property abutting upon the street. But these are temporary and passing inconveniences and affect the general public in the same manner as they affect the abutting property owner, differing only in degree.—*Romer v. St. Paul, etc., Co.*, 75 Minn. 211.

Whether street car tracks are at the side or in the center of the street, if they damage, in the constitutional sense, an abutting property owner's ingress and egress to and from the street, he has a cause of action. But, as said in the *syllabus* of *Wagner v. Bristol Belt Line Ry. Co., supra:* "An abutting owner is not entitled to damages merely because his property is made less desirable and less comfortable as a residence by reason of the fact that a street car track is laid on the side of the street next to his residence instead of in the center of the street. When the acts complained of amount simply to an inconvenience or discomfort of the occupants of the property, but the property itself does not suffer any diminution in substance, and is not rendered intrinsically less valuable by reason of the public use there can be no recovery. The property is not damaged within the meaning of the constitution."

The conclusions we have reached herein are in accord with the principles this court has heretofore announced, and

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likewise consistent with the best-reasoned cases in other jurisdictions. So it is unnecessary to continue the discussion further. The judgment is affirmed.

*Judgment affirmed.*

Decision *en banc.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT dissenting.

CHIEF JUSTICE MUSSER dissenting:

Each case is governed by its own peculiar facts. As I read the complaint, it appears to me that it alleges facts, which, if not denied or if not explained, are sufficient to show that the property in question has suffered such special damage as to call for compensation within the true intent and meaning of the provision of our constitution, which says, "That private property shall not be taken or damaged for public or private use without just compensation" (Const., art. II, sec. 15), as that provision has been heretofore construed by this court. The demurrer should have been overruled.

Mr. Justice Scott joins with me in this dissent.

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[No. 7688.]

## THE PEOPLE V. PARKER ET AL.

1. EXECUTORS AND ADMINISTRATORS—*Sale of Decendent's Lands in Another State*—The county court has no jurisdiction to order a sale by an administrator of lands of the decedent, situated in another state. Such order is void.

2. ——*Special Bond of Administrator Selling Lands—Liability of Sureties*—The bond required by statute (Rev. Stat. and Colo. Stat. Ann., sec. 7178) of an administrator directed to sell lands for the payment of the debts of the intestate, is for the protection of those interested in the estate, not the purchaser.

Void order for the sale of lands situated in another state, and sale accordingly; the sureties in the bond are not responsible to the purchaser.

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*Error to Sedgwick District Court.*—Hon. H. P. BURKE, Judge.

*On Petition for Rehearing.*

Messrs. ALLEN & WEBSTER, for plaintiff in error.

Messrs. ROLFSON & HENDRICKS, for defendants in error.

Mr. JUSTICE GARRIGUES delivered the opinion of the court:

Action in the district court against the sureties on an administrator's special bond given as required by statute upon the sale of real estate to pay debts of the decedent.

1. This action is brought against the administrator Burke, as principal, and defendants in error, as sureties on an administrator's bond given upon the sale of real estate by the administrator to pay debts.

The complaint alleges in substance that Patrick W. McNamara died owning real estate situated in both Colorado and Nebraska; that Burke as his administrator filed a petition in the county court of Sedgwick county, Colorado, to sell real estate to pay debts of the estate; that the court entered an order for the sale, among other lands, of 84.12 acres in Deuel county, Nebraska; that the bond was conditioned as follows: "* * * said Mark Burke, as such administrator of said estate as aforesaid, shall well and faithfully report any and all sales so by him made in accordance with the said above mentioned order to the said county court of Sedgwick county, and shall well and faithfully pay over and account for under the order and direction of the court to the persons entitled thereto any and all monies received as payment for the purchase of said real estate, and shall in general do and perform all such other acts, matters and things as shall at any time be required of him in the premises by law;" that Burke thereafter sold the land in Nebraska, and reported the sale to the court; that the court had no jurisdiction to make the order,

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and Burke no jurisdiction to sell the Nebraska land; that while the sale was in conformity with the statutes of Colorado, yet as to the Nebraska land, the court and administrator each exceeded their jurisdiction, although all interested parties at the time, supposed the proceedings to be legal and regular; that Burke deeded plaintiff the Nebraska premises, but the heirs of the decedent repudiated the sale, and Burke retains possession of, and refuses to return the proceeds thereof to plaintiff; that the county court upon plaintiff's petition, ordered Burke as administrator, to refund the purchase price to the plaintiff, which he neglected, failed and refused to do, whereby the terms of the bond were broken to the damage of plaintiff.

To this complaint the sureties, Parker and Loveland, filed general demurrers which were sustained, and plaintiff electing to stand upon his complaint, final judgment was entered in favor of these defendants dismissing the complaint as to them, and the case is here on error.

2. The county court was without jurisdiction over the real estate in Nebraska. Its order of sale as to this land was not voidable, but void, and gave Burke no jurisdiction in his representative capacity to sell the land, of which everyone was bound to take notice. There was no sale by Burke as administrator, of the Nebraska land, because the order of sale was void, and both the administrator and the court acted without jurisdiction.

The special bond required by statute, upon which defendants were sureties, was given to protect assets of the estate, and for the benefit of those entitled to the proceeds of the sale, not the purchaser. To the extent that the administrator represented the estate's interest in the funds derived from the sale of land, the sureties were liable for an accounting; but they could not be held for his individual acts. The statute requiring the bond, and the instrument itself show that it was a special bond given to secure an accounting by the administrator for funds coming into his hands as such, from a sale of land

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belonging to the decedent ,and for nothing else. The authorities mentioned below, show so conclusively that Burke in selling the Nebraska land acted in his individual and not in his representative capacity, and that the sureties on the bond are not liable, that we deem it unnecessary to do more than cite them.—*People v. Cobb,* 10 Colo. App. 478; *Campbell v. American Bonding Co.,* 172 Ala. 458; *Jackson v. Wilson,* 117 Ala. 432; *Pettit's Admr. v. Pettit's Distributees,* 32 Ala. 288; *Schlicker v. Hemenway,* 110 Cal. 579; *Cabanne v. Skinker,* 56 Mo. 357; *State v. Osborn,* 71 Mo. 86; *Emmons v. Gordon,* 140 Mo. 490; *Young v. People,* 35 Ill. App. 363; *Johnson v. Hall,* 101 Ga. 687; *Snodgrass v. Snodgrass,* 60 Tenn. 157; *Miller v. Meservey,* 107 Me. 158; *Given's case,* 34 N. J. Eq. 191.

The former opinion is withdrawn, the motion for a rehearing denied, and the judgment affirmed.

*Affirmed.*

CHIEF JUSTICE MUSSER and Mr. JUSTICE SCOTT concur.

Decided March 3, A. D. 1913. Rehearing denied May, A. D. 1913.

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*CONSTITUTIONAL LAW.*

*When the Constitution Is Self-Executing*—Constitutional provisions are self-executing when it appears from the context that they are intended to operate at once, without the aid of legislation to give effect to the right conferred, or enforce the duty prescribed.

Section 7, art. XVI of our constitution is of this character. It does not merely declare principles, but confers a right and prescribes the conditions and rules under and by means of which that right may be enforced.—*Lyons v. Longmont*, 112.

*Construction of the Constitution*—The purpose of a constitutional provision is to be ascertained from the words thereof. The title or caption of the article in which it is found is not controlling.

Section 7 of art. XVI, confers on all persons and corporations the right of way across any lands, public or private, for conveying water for domestic purposes. The character of the conduit is unimportant. A municipal corporation may condemn a way through and across the public streets and alleys of another municipality for the construction of a pipe-line for conveying water for the domestic uses of its inhabitants.

The latter municipality still retains authority to prescribe necessary reasonable regulations which must be observed by the former in maintaining and operating such pipe-line.—*Lyons v. Longmont*, 112.

*Legislative Power*—Under the provision of the constitution (sec. 1, art. V, Laws 1910, c. 3), that "This section shall not be construed to deprive the general assembly of the right to enact any measure," the legislature may repeal even an initiated act, approved by the people. And may by declaring that a measure is "necessary for the immediate preservation of the public peace, health and safety," prevent the reference thereof to the people. Such a declaration concludes

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*CONSTITUTIONAL LAW—Continued.*

all departments and all parties, in so far as it abridges the right to invoke the referendum.—*In re Senate Resolution No. 4*, 262.

*Legislative or Executive Questions—Doctrine of the Court*—It is the settled doctrine of the court that where a question is propounded by either the legislative or executive department, under sec. 3, art. VI of the constitution, the court will decide for itself whether the occasion is one demanding a response.—*In Re Interrogatories of the Senate*, 166.

*Where Private Rights Are Involved*, the court will not give an *ex parte* opinion in response to such interrogatories.—*In Re Senate Resolution No. 4*, 262.

Before the canvass of the vote, the person chosen to the office of lieutenant governor at the election held in November, A. D. 1912, departed this life. The person chosen to the same office at the previous biennial election was assuming to hold over, and preside in the sessions of the senate, though the senate, under sec. 10 of art. V of the constitution had elected a president *pro tem.* The senate having propounded to the court question as to the right of this person to so hold over, under the provisions of the constitution, *held*, that inasmuch as the officer so assuming to hold over was unquestionably an officer *de facto*, and his acts as such necessarily valid, the question was not one of sufficient importance or solemnity to demand the expression of an opinion by the court.—*Id.*, 166.

*As to Completed Legislation*—The duty of the court in responding to legislative questions is limited to those which relate to proposed legislation. Completed legislation is not a subject of legislative inquiry. It is not within the province of the court to advise the general assembly as to whether existing legislation upon any subject satisfies the requirements of the constitution. All departments of government are of equal dignity. Neither can declare that another has not performed a duty imposed by the constitution.—*In Re Senate Resolution No. 4*, 262.

*Pending Legislation*—There were upon the statute books two acts relating to the hours of service of men employed in mines, smelting furnaces, and other like places, one adopted by the general assembly (Laws 1911, c. 149), and which being referred to the people, had received their approval. The other, initiated pursuant to section 1 of article V of the constitution, (Laws 1910, c. 3) assuming to repeal the former. This act also received the popular sanction. A bill was pending in the general assembly upon the same subject, substantially identical with the earlier act, repealing both the former acts and declaring that the enactment therein proposed was "necessary for the immediate preservation of the public health and safety." Upon an interrogatory from the senate as to its duty in the premises, it being fairly inferable from the communication that it was a desire of that body

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*CONSTITUTIONAL LAW—Continued.*

to pass an act which should remove the embarrassments attending the situation so presented, *held*, that the question was within the provisions of section 3 of article VI of the constitution.—*Id.*

*Private Property Taken for Public Use*—A physical taking of private property for public use need not be shown in order to entitle the owner to compensation; but it must appear that some right, or interest pertaining to the property has been destroyed or impaired, before an action can be maintained. The right disturbed may be public or private, but it must be a right enjoyed in connection with the property, not shared with the public generally, a right which gives it an additional value and by the disturbance of which the property itself is damaged.

A municipality may devote its streets to all those ordinary and necessary uses to which streets are usually subjected, and to such local uses and means of conveyance as the law-making power may authorize, for the thoroughfares of the entire city. Incidental injuries occasioned by the careful exercise of such rights granted pursuant to this power are *damnum absque injuria.*

As to extraordinary or unusual uses, or unreasonable changes, or injuries to abutting property through faulty or improper construction, the rule is otherwise.

But the proper construction of a street railway, with due regard to existing local conditions, does not so augment the servitude upon the street as to entitle the owner of property abutting thereon, to compensation.

Nor does the mere fact that the tracks of a railway are laid so close to abutting property that vehicles may not stand between them and the sidewalk.

The annoyances, discomfort, and injury, suffered by the abutter from the ringing of bells, and loud and discordant noises produced by the cars in passing over the tracks and around curves, are, excepting as to degree, suffered by the public generally so far as such noises and vibrations are heard and felt, and give no action.

The abutter is, however, entitled to receive at, or remove from his premises, persons or goods, and to have vehicles stand in front thereof upon the street, for the time reasonably necessary for this purpose, even though this may temporarily interfere with the passage of others; and if this right is interfered with he may have redress therefor in a proper action.—*Harrison v. Denver Tramway Co.*, 593.

*Damage to Private Property*—Under sec. 11 of art. XV of the constitution, and sec. 5420 of the Revised Statutes, those who by license of a city, construct a railroad upon the streets thereof, stand, as to any liability to make compensation for private property taken or damaged, in the place of the city.—*Id.*

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*CONSTITUTIONAL LAW—Continued.*

*Police Power—Restrictions Upon Building*—One of the essential elements of property is the right to its unrestricted use and enjoyment. Restrictions upon the use of private property are permissible only when necessary to the general health, comfort or general welfare of the public. A use of private lands which does not infringe the rights of others or impair the welfare and security of the public cannot be prohibited under the police powers of a municipality.

An ordinance which assumes to prohibit the erection, upon an ordinary street, of a store building, which, in respect of material and manner of construction complies with all local regulations, and is in no sense a menace to the health, comfort, safety or general welfare of the public, and involves no injury or insecurity to others, without first procuring the consent of the other owners of property in the same block, on each side of the street, and submitting to other burdensome regulations, is not within the implied powers of a municipal corporation, deprives the owner of his property without compensation, and without due process of law, is opposed to our bill of rights, secs. 3, 15, 25, and to the fourteenth amendment of the federal constitution, and is void.—*Willison v. Cooke*, 320.

*Revenue Bills*—A bill designed to accomplish some well defined purpose other than raising revenue is not within the prohibition of sec. 31, art. V of the constitution, even though, as incident to its main purpose, it contains provisions, the enforcement of which may produce revenue. An act, the primary purpose of which is to regulate insurance companies (Laws 1907, c. 193, Rev. Stat., c. 70) is not to be regarded as within the constitutional provision merely because certain small fees, and a tax upon the gross amount of the premiums collected in each year, are imposed upon the insurance companies.—*Colorado Life Co. v. Clayton*, 256.

*Increase in Judicial Districts—Change of Boundaries*—The increase, diminution, or change of boundaries in the judicial districts or in the number of judges in any district, referred to in section 14, of art. VI of the constitution is such as is brought about by the formation of a new district or the abolition of an existing one. The section has no relation to legislation changing a county from one district to another, so as not to abolish any district.—*In Re Senate Resolution No. 9*, 429.

*Change of County from One District to Another—Effect*—Where a county is changed from one district to another, the judge of the latter district will thereafter preside in the district court of such county; neither of the judges of the district from which the county is taken is thereby removed from office.—*Id.*, 429.

*Delegation of Legislative Power*—The constitution prohibits the delegation of the powers of the legislature. A statute (Laws 1910, c. 5) required every railway company to furnish cars to shippers; to

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*CONSTITUTIONAL LAW—Continued.*

prescribe reasonable time schedules for the operation of trains; prohibited undue advantages to particular localities; and required the utmost diligence in the carriage of goods committed to them for transportation. Neither the number of trains to be operated, the time within which any train should run, or the equipment of the trains was specified. Other provisions of the act provided for the appointment of a commission charged with the administration of the statute, and authorized to direct what equipment should be supplied, what trains should be operated, and what other duties expressly or impliedly imposed upon common carriers should be exacted of them. *Held*, not a delegation of legislative power.—*Colorado and Southern Co. v. State Railroad Commission*, 64.

*Statute Unconstitutional in Part*—If a statute contains an unconstitutional provision which was inducement to its passage, and all its parts are so closely connected as to compel the conclusion that the act would not have been passed without the vicious provision, the infected clause must be condemned to the extent of the infection.—*Colorado Life Co. v. Clayton*, 256.

*Article XX*—Immediately upon the taking effect of article XX of the constitution, the official term of the superintendent of schools next theretofore elected for the old county of Arapahoe, terminated. No such office existed in the new entity, the city and county of Denver, and there could be no incumbent thereof. Having been chosen to the office of superintendent of schools for the city and county of Denver, at the first election under its charter, adopted pursuant to article XX, she was not entitled to receive, in such office, the salary prescribed by the general law, but only that fixed by the charter.—*Denver v. Meyer*, 96.

*Particular Statutes*—The act for the appointment of a railroad commission (Laws 1907, 531, Rev. Stat. c. 121, art. VII,) is a constitutional enactment. *Consumers League v. Colorado &c. Co.*, 53 Colo. 54 followed.—*The Colorado Etc. Co. v. Railroad Commission*, 64.

*CONTEMPT.*

*Application for Change of the Trial Judge*—In an application for a change of the trial judge the facts upon which the alleged bias of the judge then presiding is predicated, must be set out. This is not a contempt, unless it is established by evidence that such statement of facts was made with a reckless disregard of the truth, or with the intention to reflect upon the honor, integrity, and character of the judge.—*In Re Smith*, 486.

A conviction of contempt in such case, without evidence, where the language of the application is not contemptuous *per se* is error.—*Id.*

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*CONTRACTS.*

*Validity—Restraint of Trade*—One purchasing the business of a competitor with the good will thereof may lawfully exact from the seller a stipulation not to carry on the same business within such limit of time and space as is reasonably necessary for the buyer's fair protection. The mere fact that such restraint extends to the limit of the state, or even to a wider territory, is not of itself sufficient to condemn it. The public welfare is the first consideration, and if this is not adversely affected, and the contract imposes upon the seller no greater restraint than is necessary for the protection of the buyer, it is sustained.—*Barrows v. McMurtry Co.*, 432.

*Voluntary Bond*, upon consideration, and not prohibited by law, binds the surety, though not in statutory form.—*National Surety Co. v. People*, 365.

*Inviolability of—Public Policy*—To a bill to restrain the defendant's violation of a covenant not to engage in a certain business for a limited time and area, the defendant set up the unfounded pretense that the sale of his stock and good will upon which his covenant was founded conferred a monopoly upon plaintiff, or tended so to do, the court, repelling this contention upon the facts shown, observed that while the general welfare is subserved by healthy competition there can be no sound or wholesome public policy which lends approval in the slightest degree to the open violation of personal contracts entered into in good faith, and upon fair consideration; that it is quite as important to the public welfare that evil minded persons be not allowed to transgress with impunity their solemn undertakings, as that the public should have protection in other respects.—*Barrows v. McMurtry Co.*, 432.

*Construed*—A memorandum was signed by both parties as follows: "Pictures left with Mr. Smith on approval." Then followed the names and description of certain pictures. Opposite to each was set down the price, the whole amounting to.....$1,900

Under this was the following: "Credit by old frame..... 10

"$1,890"

"The above paintings may be exchanged at any time for face value "(that is, the price paid plus the increased market value)." *Held*, not a sale but a mere option to purchase.—*Steinhauer v. Henson*, 426.

The doctrine that a surety is a favorite of the law, and that a claim asserted against him is *strictissimi juris* has no application to a bond, executed upon consideration, by a corporation organized to execute such bonds for a profit. Such a corporation is in effect an insurer; its contracts are, as a rule, in terms prescribed by the corporation itself, and should be construed most strongly in favor of the obligee.—*Empire Co. v. Lindenmeier*, 497.

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*CONTRACTS—Continued.*

The contractor for the erection of a building agreed to "furnish all materials and do all the work," etc. Defendant became surety for such contractor. *Held*, that defendant was liable for the amount of a lien established against the building for material furnished the contractor, though the owner had not discharged such lien.—*Id.*

*Alteration of. See ALTERATION OF WRITINGS.*

*CORONER.*

*No Fee Allowed for Mere Investigations*—Under Rev. Stat., sec. 2577, the coroner is not allowed compensation for the investigation of cases of violent or sudden death, when he holds no inquest; and section 1219 of the Revised Statutes does not have the effect of allowing such compensation.—*McGovern v. Denver*, 411.

*CONTRIBUTORY NEGLIGENCE.*

*Examples*—Deceased stepped so immediately in front of a street car that it was impossible to prevent injury to her. Those in charge of the car did everything that could reasonably be expected of them to avoid the collision. Her death gave no action.—*Liutz v. Denver Co.*, 371.

*Last Clear Chance*—In order to the application of the doctrine of the "Last Clear Chance" the circumstances must present a clear chance to avert injury by the exercise of reasonable care. All the circumstances are to be considered. One who, without fault on his part, is presented with the sudden appearance of instant and awful danger to a human being is not culpable for merely failing to manifest the same presence of mind, or exercise the same care and effort, as might be expected in an ordinary situation.—*Liutz v. Denver Co.*, 371.

*CRIMINAL LAW.*

*Accessory—Principal*—An accessory may, under Rev. Stat. 1620, be indicted and punished as a principal. The dismissal of an information as to a principal, and his discharge, does not justify the discharge of the accessory by the court of its own motion, against the protests of the district attorney. At that stage of the proceedings only the district attorney may order a discontinuance.—*People v. Zobel*, 284.

*Murder—Death of One by a Blow Intended for Another*—One engaged in an affray with a particular person kills both that person and an innocent bystander. If guilty of murder in the case of his adversary, he is guilty of murder in that of the bystander.—*Henwood v. The People*, 188.

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*CRIMINAL LAW—Continued.*

*Homicide—Self-Defense—Right to Act on Appearances*—Where to an information for murder the defense is that the prisoner acted in defense of his household against serious bodily injury threatened by the deceased, the jury are to take into consideration, what, under the circumstances, the prisoner might have reasonable cause to believe as to the intentions of the deceased. An instruction to the effect that in order that the doctrine of self-defense should apply, the jury must believe that deceased intended to assault or kill the inmates of the house, is error, as a denial of the right of self-defense as defined in the statute (Rev. Stat., sec. 1632).—*Bailey v. People*, 337.

*Right of Householder to Defend His Dwelling*—A householder may repel by force one who seeks to forcibly enter his dwelling; and if the conduct, words, and known character of the assailant are such as to excite in the mind of a reasonable person the belief that his purpose is to kill or do great bodily harm to some person within the house, the householder is justified in carrying his defense, even to the taking of life.—*Bailey v. People*, 337.

*Manslaughter—Involuntary*—One who, exercising the right of self-defense, discharges a pistol at his adversary, but acts without due regard to the presence of others, and unintentionally kills a bystander, may be declared guilty of involuntary manslaughter.—*Henwood v. People*, 188.

*Bribery of Officers*—The county commissioners of a county are ministerial officers within the meaning of sec. 1720, Revised Statutes, and a conviction may be had under the statute, for the bribery of one of the county board.—*Sheely v. People*, 136.

*Embezzlement of Corporate Funds—Consent of Officers*—Where the officers of a corporation fraudulently consent to the appropriation of its funds by one of their number, on pretense of satisfying a factitious and groundless claim which he asserts against the corporation such consent is no defense to the charge of embezzlement.—*LeMaster v. The People*, 415.

*Gambling—Statute Construed*—Under sections 1791, 1792 of the Revised Statutes neither the keeping of gambling devices nor playing a game is prohibited, but only gaming for money or property, or betting upon the result of a game.—*Everhart v. People*, 272.

A game is any sport or amusement, and includes physical contests, whether of man or beast.

Gaming is the risking of money or property on a contest of chance, skill or hazard, wherever one must win and the other lose.

Horse-racing is gaming, and a wager on the result of a horse-race is within the words of the statute, "any game whatsoever."—*Id.*

The statute prohibits gambling, the keeping of a place where gambling is commonly carried on, the keeping at such place, and ex-

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hibiting of gambling devices, and the betting of money or other property upon the result of any game.—*Id.*

Gambling devices as used in the statute include any device or apparatus kept or used for gambling.—*Id.*

One who, at a race meeting, had a space adjoining the grand stand, a blackboard upon which were entered the names of the horses competing, received bets upon the races, and issued cards recording the bet, upon the presentation of which after the race he paid the sums won, was declared to be guilty of keeping a gambling table, establishment, device or apparatus.—*Id.*

The territorial act of Jan. 7, 1867, (Laws 1867, 114) is not a legislative construction of the statute against gambling. It simply suspended for one day in each year, at a certain place, the operation of the statutes against gambling, as to certain specified acts thereby prohibited.—*Id.*

*Indictment or Information, for Murder*, includes all the lower grades of homicide.—*Henwood v. People*, 188.

*Evidence—Depositions*—In order to enable certain non-resident witnesses for the people to return to their homes their depositions are taken, under the statute (Rev. Stat., secs. 7277-7279), by consent and in the presence of the accused. It is not error to receive such depositions, in behalf of the people though no affirmative proof is given that the personal attendance of the witnesses might not be procured.—*LeMaster v. The People*, 415.

*Letters of Corporation Admissible Against the Managing Officer*—Information against the managing officer of a corporation for embezzling the corporate funds. Letters purporting to come from the corporation, and shown to have been received, in due course of mail, by the witnesses producing them, and which relate to transactions had between the corporation and those so producing them, at a time when the accused was controlling the affairs of the corporation and which tend to show the source of the funds in question, are admissible, without evidence identifying the handwriting of such letters.—*Id.*, 415.

*Copies of Letters*—In the same case copies of letters written or dictated by the accused, in reply to those received from the corporation, were held admissible against him, the originals not being produced nor accessible.—*Id.*, 415.

*Copies of Letters of the Corporation*, found in its impression book, written at defendant's dictation, and mailed to persons in other states, were held admissible against him, without any showing to excuse the non-production of the originals. The book was regarded as, in effect, containing the letters of the accused, and the letters a declaration against interest.—*Id.*, 415.

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*CRIMINAL LAW—Continued.*

*Annual Report of the Corporation*, filed in the secretary's office and certified therefrom, and tending to show criminal intent, held admissible for the people.—*Id.*, 415.

*Account Books of the Corporation*—Information against the managing officer of a corporation for the embezzlement of its funds. The defense being that the moneys in question had been properly applied by the accused to discharge salary due him, the account books of the company were held admissible to show what had in fact been paid him on account of salary.—*Id.*, 415.

The evidence held sufficient to identify the books produced, as those of the corporation.—*Id.*, 415.

*Expert's Examination of Account Books*—Voluminous books of account of such character as to render it difficult for a jury to arrive at correct conclusions therefrom, may be explained by an expert accountant, and the true state thereof shown by his testimony—the books being produced in court.—*Id.*, 415.

*Relevancy*—The corporation, the embezzlement of whose funds was charged against the prisoner was in effect the accused himself. *Held*, that its insolvency might be shown as bearing upon the intent of the accused.—*Id.*, 415.

Deceased was the husband of a sister of the prisoner. The homicide was committed while deceased was attempting to forcibly enter the house of the prisoner where the wife had taken refuge, and was refusing to return to him. Evidence of acts of brutality committed by deceased upon the person of his wife, that these had been made known to the prisoner, that the wife had fled to the house of prisoner for protection, that deceased had made threats to take the life of both the wife, and the prisoner, and that the general reputation of deceased was that of a quarrelsome and dangerous man, is admissible to show the state of mind of the prisoner, and the apprehensions which he might reasonably entertain as to the designs of the deceased.—*Bailey v. People*, 337.

*Insufficient Evidence—Power of the Court. Semble*—That if upon the trial of an information the evidence is insufficient to warrant a conviction the court may order the discharge of the accused.—*People v. Zobel*, 284.

*Confessions—Privileged*—A statement made by an accused person to an officer, in the presence and through the aid of a clergyman, is not to be excluded on suggestion of the ecclesiastical character of such clergyman, where it does not appear that the clergyman was the spiritual adviser of the accused, or even that they were of the same sect, or denomination.—*Mitsunaga v. People*, 102.

*Prosecution Not Bound by*—The prosecution are not bound by the statements made by the prisoner, even though produced in chief

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*CRIMINAL LAW—Continued.*

against him, and though they are not contradicted. It is for the jury to say how far the statement is to be accepted.—*Id.*

*Former Jeopardy*—Conviction of murder in the second degree. Judgment reversed for error in law. Under the constitutional provision (sec. 18, art. II,) the accused stands in the same position as if the first trial had never been had. He may be put upon trial for the highest degree of the crime.—*Young v. People*, 293.

*Change of Venue—Application*—An application for a change of venue under Mills' Stat., sec. 4613 (Rev. Stat., sec. 6963), must be verified by the defendant in person. An application not so verified is properly denied.—*Young v. People*, 293.

*Prejudice of Judge*—Where an application for a change of the venue assigns as the ground thereof prejudice on the part of the judge, affidavits expressing merely the belief of the affiant that the applicant can not have a fair trial, etc., because of the prejudice of the judge, not averring any fact upon which the belief is based, are insufficient. The requirement in the present statute that prejudice of the judge must be *shown* is of the same effect as the earlier statute by which the facts were expressly required to be stated.—*Id.*, 293.

*Appointment of Special Prosecutor*—Upon affidavit filed charging the district attorney, his deputy, and others with an assault upon the affiant, the district court appointed an attorney to prosecute the offense charged. The attorney so appointed filed an information against all the parties named, jointly. The district attorney and his deputy, being tried separately, were acquitted. As to the others, the special prosecutor entered a *nolle*, and later, by leave of the court, withdrew from the prosecution. The same affiant thereupon filed a second affidavit charging the same persons with instigating a riot at the same time and place mentioned in the former affidavit, and with committing an assault, not only upon himself, but upon members of his family as well. The district attorney thereupon filed a motion to quash the last information, upon the ground that the court, by the first appointment had exhausted its powers, and the second information was therefore a nullity.

The motion was held properly denied and both certiorari and prohibition was refused. The authority of the court to appoint a special prosecutor in the second instance was declared to be the same, under the statute (Rev. Stat., sec. 2109), as in the first.—*Gray v. District Court*, 42 Colo. 298, distinguished.—*The People ex rel. v. District Court*, 233.

HILL, J., dissented.

*Duty of Prosecutor*—Information for wilful murder. Deceased was the husband of sister of prisoner. She had taken refuge from the husband's brutalities at the house of the prisoner where her mother was also residing. The homicide was committed while the deceased

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was attempting to force himself into the house of the prisoner in order to coerce the wife to return to him. The prosecutor was permitted to propound questions which, by innuendo, tended to reflect upon the moral character of defendant's house, and those who resided there. There was no evidence justifying these insinuations. The conduct of the prosecutor was declared reprehensible. "It is the duty of all counsel to repudiate all appeals to unworthy prejudice, and this is eminently so in the case of one who prosecutes for the people.—*Bailey v. People*, 337.

The prosecutor is bound to see to it that no unworthy advantage is taken of the accused, and this is especially so where accused is a poor person, and defends by appointed counsel.—*Id.*, 337.

*Practice—Opening Statement of Prosecutor*—A narration by the prosecutor, in his opening statement, of the details of an alleged confession of the prisoner is harmless, where the confession is afterwards held competent and admitted. But it seems the better practice merely to refer to the confession, without going into details.—*Mitsunaga v. People*, 102.

*Questions for Jury*—Where upon the trial of an information for murder there is evidence sufficient to go to the jury of circumstances tending to excite in the accused a sudden heat of passion, the question whether they amount to the statutory provocation, so as to reduce the offense to the grade of manslaughter (Rev. Stat., sec. 1625,) is for the jury.—*Henwood v. People*, 188.

*Instructions*—Where upon the trial of an information for a murder there is evidence sufficient to go to the jury tending to show that the prisoner delivered the fatal shot under the influence of a sudden and irresistible passion, it is error to take from the jury the question of the degree of the crime. The jury must be left free to find guilty of manslaughter, even though the prisoner, testifying in his own behalf, asserts that he acted only in self-defense.—*Henwood v. People*, 188.

*Must Be Based Upon the Evidence*—In the trial of one accused of wilful murder an instruction upon the law of manslaughter is properly refused where there is no evidence upon which a conviction of that degree of homicide can be rested.—*Mitsunaga v. People*, 102.

*Construed*—An instruction declared that "deliberately" does not mean brooded over, or reflected upon, for a week, day or hour, "but an intent to kill executed by *the* defendant" in cold blood. The use of the definite article in referring to the accused was held not to be taken as the court's expression of a belief in his guilt.—*King v. People*, 122.

*To Be Taken as a Whole*—What is omitted from one part of the charge may be effectually supplied by what is said elsewhere therein.

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*CRIMINAL LAW—Continued.*

The jury were told by one instruction that to warrant a verdict of guilty they must find that the killing was with premeditation. The failure to impose upon the prosecution the burden of establishing the defendant's guilt, by the evidence, beyond reasonable doubt, was *held* immaterial where this was prescribed elsewhere in the charge.—*Id.*

One instruction told the jury that if they should find from the evidence beyond reasonable doubt that another person than the accused committed the homicide, and from the evidence, beyond reasonable doubt, that the prisoner unlawfully, feloniously, premeditatedly, etc., abetted or assisted, etc., he also was guilty of murder in the first degree. By another instruction the two degrees of murder as defined in the statute were fully explained. *Held*, that the effect of the instruction first quoted was not to take away from the jury the degree of the homicide.—*Id.*

By one instruction the jury were told that if they should find from the evidence beyond reasonable doubt that the prisoner and one Fields, at a time and place named, wilfully, etc., engaged in an attempt to rob the deceased, and in this attempt Fields inflicted upon the deceased a mortal wound, and at the time, etc., the prisoner "was present, unlawfully, feloniously, etc., aiding, abetting, assisting, etc.," the prisoner was guilty of murder in the first degree. *Held*, that this instruction in no manner invaded the province of the jury.—*Id.*

By another instruction the jury were told that if Fields committed the homicide without premeditation, and that the prisoner aided therein, the prisoner was guilty of murder in the second degree, provided they should further find, etc., that the homicide was not committed in an attempt to rob. *Held*, that thereby the jury were in effect instructed that though the homicide was without premeditation, it was murder in the first degree unless they should further, affirmatively, find that it was not committed in an attempt to rob. Whereas, if there was no premeditation, and the jury made no finding upon the question whether it was committed in an attempted robbery, the prisoner could be convicted only of murder in the second degree. And the evidence not being preserved in the record, it was not to be presumed that it supported only the charge of murder committed in the perpetration or attempted perpetration of a robbery, where the court had charged, not only upon that theory, but upon the theory of an actual preconceived design to take the life of the deceased, and upon the theory of murder in the second degree. The conviction was therefore reversed.—*Id.*

Where in the trial of an indictment the jury are told, by an instruction applying to all the witnesses, that in determining the weight to be given to their testimony they should take into consideration the motive any witness may have to testify falsely, it is not error to say to the jury, in another part of the charge, that the accused is subject

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*CRIMINAL LAW—Continued.*

to the same test as other witnesses, and that they should take into consideration his interest in the result of the trial.—*Mitsunaga v. People*, 102.

On the trial of an information for wilful murder the court charged that where the homicide is committed "with a weapon calculated to produce and actually producing death, malice may be legitimately inferred, in the absence of proof that the act was done in necessary self-defense or upon sufficient provocation, and the presumption in such case will be that the act was voluntary, and committed with malice."

*Held*, that the jury were not required to infer malice, but advised merely that such inference would be legitimate; that the question of malice was left to the jury. And the court having further charged that malice is not presumed in law, but for the jury to determine from the evidence, that it was not a subject of legal presumption, or inference, and that each fact necessary to establish the guilt of the accused must be proven beyond a reasonable doubt, by evidence of facts and circumstances consistent with the prisoner's guilt, and inconsistent with any other reasonable conclusion, *held*, that any implication that malice was to be inferred as matter of law, was removed.—*Young v. People*, 293.

*Writ of Error by the People*—Three were made defendants in a civil action for the value of ores alleged to have been stolen. Judgment was recovered against all. An information then pending against the same persons, for the larceny of the ores, was discontinued by the district attorney, as to two of the defendants, upon their promise to give testimony against the third, one Z. The presiding judge thereupon announced that the evidence heard in the trial of the civil action satisfied him that those as to whom the information had been dismissed were the real principals, and Z only an accessory, and that as the principals had been discharged the accessory could not be prosecuted; and, over the objections of the district attorney, the court dismissed the information, discharged Z, and exonerated his sureties. *Held*, in legal effect, the discharge of Z was upon "a plea in bar" orally interposed by the court, and that a writ of error by the people lay under the statute (Rev. Stat., sec. 1997).—*People v. Zobel*, 284.

*Judgment*—The order of the district court discharging an accused person being reversed, the cause was remanded for further proceedings according to law.—*Id.*

*DAMAGES.*

*Measure of Damages—Purchaser Refusing to Accept an Article Manufactured for Him According to His Plans*—The rule is practi-

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*DAMAGES—Continued.*

cally universal in this country that where a purchaser refuses, without legal justification, to accept an article manufactured to his order, after special design, the vendor may, at his election, hold the article for the purchaser and recover the contract price with interest.—*Bond v Bourk*, 51.

And the purchaser is not allowed advantage of the non-performance by the vendor of conditions, the performance of which he himself has prevented, *e. g.*, where, the article being a soda fountain, the defendant has refused to permit the plaintiff to install it, as the contract required.—*Id.*

Nor will the purchaser be allowed the benefit of a stipulation that some part of the price shall be paid in installments, at future times specified.—*Id.*

The tender of the article, and plaintiff's election to sue for the contract price, vests title in defendant for the purposes of the action. —*Id.*

*DEMAND.*

The institution of a suit is a sufficient demand.—*Empire Co. v. Lindenmeier*, 497.

*DENVER.*

*Charter Construed*—The charter of Denver (sec. 17) authorized the city council to enact and enforce ordinances necessary to protect life, health, and property; to declare, prevent, and summarily abate nuisances; and preserve and enforce good government, the general welfare, order, and security of the municipality, and the inhabitants thereof. *Held*, not to confer power to prohibit the erection of a store building upon lots fronting upon an ordinary street, without first obtaining the consent of the owners of the property in the same block, on each side of the street, and submitting to other burdensome restrictions.—*Willison v. Cooke*, 320.

*Vacating Street for Viaduct—Effect*—Under sec. 297 of the charter of Denver the fee in a street vacated for the construction of a viaduct remains in the city. It does not revert to the owner of the abutting property.—*Albi Co. v. Denver*, 474.

*DISTRICT COURT.*

*Jurisdiction*—The district court has no jurisdiction to review the judgments of the county court and vacate them for error.—*Pinnacle Co. v. Popst*, 451.

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*DIVORCE AND ALIMONY.*

*Appearance of Defendant—Effect*—Action by husband for a divorce. The wife's voluntary appearance dispenses with the service of process, and confers jurisdiction upon the court.—*Castner v. Gray*, 551.

*Alimony—Amount—Discretion of the Court*—Where a divorce is granted to the wife the amount of alimony to be awarded is in the sound discretion of the trial court. Its award will not be disturbed unless a clear abuse of the discretion is shown. An allowance to the wife, no longer able to perform hard labor, of a sum not exceeding one-half the net value of the husband's estate, acquired by their joint labors and economy, was held not only a proper, but a wise exercise of the discretion.—*Van Gordor v. Van Gordor*, 57.

*DURESS.*

*Evidence*—Defendant had sold his stock, business and good will, covenanting not to engage in the same line within a limited time and area. On bill brought to restrain the violation of this covenant the defense was that defendant's contract was induced by threats made by the plaintiff. The fact that, very shortly after the sale, defendant had resumed business in the same line was held to negative this contention.—*Barrows v. McMurtry Co.*, 432.

*DWELLING.*

*Right of Householder to Defend.* See CRIMINAL LAW.

*EMINENT DOMAIN.*

*Damages to Land Not Taken*—In proceedings under the statute of eminent domain the jury should allow all damages, present and prospective, which are the natural and necessary or reasonable incident of the taking.—*Farmers' Co. v. Cooper*, 401.

*Negligent or Wrongful Construction*—Anticipated damages, by reason of the negligent or unlawful construction of the improvement, by the petitioner, are not to be allowed. But where, before the hearing the petitioner had assumed possession, and constructed an irrigating canal across a gulch or ravine, by means of an embankment, without any opening, and had thus prevented the land owner from receiving the waters of a spring which rose above the embankment, and seepage waters which before that had, with the waters of the spring been wont to flow down the gulch, and had for years been applied by the land owner to beneficial uses, it was *held*, not a case of anticipated damages, but an actual, present injury, depreciating the value of the land not taken, and for which, though resulting from the manner in which the work was constructed was properly considered, in the estimate of damages.—*Id.*, 401.

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*EMINENT DOMAIN—Continued.*

*Incidental Damages*—Destruction of growing crops, injury by flooding, to an orchard, upon the land not taken, and to buildings situate thereon, additional fencing made necessary by reason of the improvement, and that portions of the land are made inaccessible and practically valueless, are proper matters of consideration, as bearing upon the difference in market value, before and after the taking, of the land not taken; but not as constituting separate elements of damage. No allowance should be made for these particular injuries, as such. They are to be considered solely as bearing upon the depreciation in value of the land not taken.—*Id.*, 401.

*Evidence—Rental Value*, of the land, within a time reasonably proximate to the time of the assessment, may be shown to aid in estimating the depreciation in value of the land not taken. The assessment being had in March, 1910, *held*, that the rate at which the land rented prior to 1908, was properly rejected, as too remote.—*Id.*, 401.

*Petition—Effect As An Admission*—The petitioner in proceedings in the eminent domain act impliedly admits that those named as respondents are the owners of the land, and of all appurtenances thereof, including the right to enjoy the waters of a spring rising thereon, and seepage waters which accumulate there, all of which such respondents have for many years applied to beneficial uses.—*Farmers' Co. v. Cooper*, 406.

*EQUITY.*

*Reformation of Writings*—The general rule is that a contract entered into under mistake as to some essential element may be avoided in a proper action.

The defendant was indebted to plaintiff in $3,500, the balance of the contract price for the erection of a school-house. Through mistake as to the amount which he had received he stated the balance due him at $2,285.00, and claimed the further sum of $200.00 on account of extras, and damages by reason of delays of the district. A compromise was finally effected by which he accepted $2,285.00 in full settlement of his demand, each party believing at the time that this was the true balance of the contract price. Plaintiff was entitled to vacate the settlement, and have a new settlement made based upon the true facts.—*Beck v. School District*, 546.

*Mistake of One Party Only*—In the same case it was said that if defendant, being conscious of plaintiff's mistake, took advantage of it, he would still be entitled to relief.—*Id.*

*Purchase Bona Fide—Notice—Presumptions*—Where it is sought to set aside the title of one who is admitted to have purchased for value, without actual notice of an alleged fraud invalidating his title, upon evidence of matters putting him upon inquiry, it will not be presumed that inquiry on his part, diligently pursued, would have re-

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*EQUITY—Continued.*

sulted in the discovery of any other or different facts than those which the complaining party establishes on the trial.

The evidence produced to establish constructive notice examined and held insufficient.—*Pinnacle Co. v. Popst*, 451.

*ESTOPPEL.*

*By Record*—Action for deceit in the sale and conveyance of certain lands, and a water right for the irrigation thereof. The complaint alleged misrepresentation as to the character and value of the water right. In a former action against the defendant plaintiff, at first, made the same charge of fraud, but afterwards, with full knowledge of the facts, abandoned such charge, and so amended his complaint as to assert that the conveyance in question was effective, not only as to the water right therein described, but also conveyed, as an appurtenance to the land, another water right theretofore vested in defendant, and in the trial of such former cause, plaintiff had, in open court, declared by his counsel that he made no claim that he had been defrauded in the transaction which culminated in such conveyance. *Held*, that he was estopped to renew the charge of fraud.—*Norcross v. Cunningham*, 517.

*By Conduct*—Plaintiff sued to restrain the collection of irrigation district taxes upon certain lands, and for a decree that his lands were no part of the irrigation district. His complaint alleged, and the court found, that prior to the organization of the district, and ever since, he was the owner of water rights sufficient for the irrigation of his lands, and which he had always since applied to this purpose; and that the district was not formed to acquire such water rights, and had not acquired them; upon account of which facts the plaintiff claimed that he was within the proviso of the first section of the act under which the district was organized (Laws 1901, c. 87).

But plaintiff, with full knowledge of the situation, had signed the petition for the organization of the district, which, as therein defined, included the land described in his complaint. During two years following the organization of the district he had paid irrigation district taxes upon said land. Without objection from him, proceedings had been taken, and a decree entered under the act, declaring the validity of the district, and confirming an issue of district bonds. The court were of the opinion that if plaintiff's lands had not been included within the district as proposed, he might, under the last proviso of section 2, have procured them to be included; that his signature to the petition was equivalent in effect to an application under this proviso, was a representation that his lands were such as might under the statute be so included, and a prayer for such inclusion; that the action of the board of county commissioners establishing the district

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*ESTOPPEL—Continued.*

was in the nature of a judgment; and that plaintiff by his conduct was estopped from afterwards denying, or bringing in question, the truth of his own representation upon which the board had taken action, especially in view of the fact that the district had contracted a large indebtedness to supply water to all the lands included therein.—*Montezuma District v. Longenbaugh*, 391.

A statute (Act 1901, c. 87) required, as the initiatory step for the organization of an irrigation district, a petition to the board of county commissioners, signed by a majority of the resident free holders who were qualified electors and owners of a majority of the whole number of acres belonging to resident electors, within the proposed district. *Held*, that one who has subscribed such a petition will not be permitted to afterwards dispute the facts therein asserted, even though his name is necessary to make up the required majority.—*Id.*

*EVIDENCE.*

*Judicial Notice*—A municipal ordinance is not judicially noticed but must be established by proof.—*Wolfe v. Abbott*, 531.

*Burden of Proof*—Where goods are delivered to bailee in good condition, and are returned injured or in defective condition, or not at all, a presumption of negligence on the part of the bailee at once arises, and the burden is upon him, if he would exonerate himself, to show due care.—*Nutt v. Davison*, 586.

*Competency—Action Against a Carrier for the Loss of a Trunk*—The evidence tended to show the delivery of the trunk by plaintiff to the porter of a certain hotel. *Held*, that defendant was at liberty to show that this porter had no authority to accept baggage for it.

Plaintiff by his deposition testified that the driver of defendant gave him its check, of a certain number, for his trunk. The check was not attached to the deposition. A letter of the defendant which was read in evidence stated that he received a hotel check from the porter of a certain hotel.

At the trial plaintiff's attorney offered what purported to be a check of defendant of the same number as that mentioned in plaintiff's deposition; but it was not identified, or its authenticity in any manner shown. *Held*, that an objection to its admission should have been sustained.—*Denver Co. v. Gast*, 16.

*Relevancy*—Action for an injury occasioned by the collapsing of a chair provided for plaintiff in the dining-room of defendant's hotel, where plaintiff was a guest. There were many chairs in the same room, some like that offered to plaintiff, others of different style, structure, and fashion. The particular defects in the chair provided for plaintiff were not shown. Testimony as to the alleged defective condition of other chairs in the dining-room, and other accidents occur-

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*EVIDENCE—Continued.*

ring there prior to plaintiff's injury, were held irrelevant to the issue. —*Burchmore v. Antlers Co.*, 314.

*Admissibility—Fraud*—The defendants induced plaintiff to purchase an interest in a worthless mine by falsely representing, among other things, that one of them had paid to the other a large sum of money for an interest in the property, exhibiting a check for the sum mentioned. In fact the check was drawn upon a bank where the drawer had no funds, and after the accomplishment of the fraud was surrendered. In an action to rescind the purchase it was held that evidence of this false representation was properly admitted; that the rule that false representations by vendor as to what he has paid for what he proposes to sell, had no application.—*Springhetti v. Hahnewald*, 383.

*Admissions—In Pleading*—The petitioner in proceedings under Eminent Domain Act impliedly admits that those named as respondents are the owners of the land, and of all appurtenances thereof, including the right to enjoy the waters of a spring rising thereon, and seepage waters which accumulate there, all of which such respondents have for many years applied to beneficial uses.—*Farmers' Reservoir Co. v. Cooper*, 401.

*Admissions—By Conduct*—Delivery of an appeal bond by the surety therein, with, a signature affixed purporting to be that of the principal, and the filing thereof by the principal, is sufficient evidence of the verity of such signature.—*National Surety Co. v. People*, 365.

*Cross-Examination*—It is not admissible to interrogate a witness on cross-examination as to matters not germane to his testimony in chief, and having no reference to statements attributed to him at variance with his testimony.—*Mitsunaga v. People*, 102.

The extent to which cross-examination may be carried is largely in the discretion of the trial court. One who had been a prisoner in the county jail at the same time with the accused, testified to conversations had with him during such imprisonment. This witness had been in jail on several occasions. *Held*, not an abuse of discretion to exclude a question propounded on cross-examination, as to the charge upon which he had first been arrested.—*LeMaster v. People*, 415.

*Discrediting Witness*—Prior statements, of a witness about matters upon which he has not given testimony are not to be shown; nor statements touching collateral irrelevant, or immaterial matters, which have no tendency to affect his credibility or test his recollection.—*Mitsunaga v. People*, 102.

*Lost Writings—Evidence of Loss*—The law does not require direct and positive proof of the loss or destruction of a document, but only such evidence as will raise a reasonable inference of such loss or destruction. Action upon a bond to secure performance of a contract for

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*EVIDENCE—Continued.*

the construction of a house, according to the plans and specifications of an architect named. The contract provided that the specifications were and should remain the property of the architect. The architect testified that he had made very careful search for them, entirely without success. *Held*, that the loss of the specifications was satisfactorily excused, and the contract, without the specifications, was held properly received in evidence.

But the court note that the action was not founded upon any departure from the plans or specifications, and that the cause could as well be determined without them as if they had never existed.—*Empire State Co. v. Lindenmeier*, 497.

*Testimony of Witness Indirectly Contradicted*—The positive testimony of a witness is not necessarily accepted as true, merely because not directly contradicted. The contradiction may be by circumstances, or by the testimony of another witness, inconsistent with that of the first. In such case the court or jury may exercise a judgment as to the probative effect of the evidence. Where such conflicting testimony appears upon the whole record to justify a well grounded inference by reasonable men, the question in dispute should be left to the jury.—*Victor v. Smilanich*, 479.

*Deceased or Absent Witness—Testimony on Former Trial*—Upon the second trial of an indictment for murder, it being shown that one witness examined for the people at the first trial, had left the state, and that two others were dead, their testimony (as found in the prisoner's bill of exceptions taken at the first trial), was held admissible for the prosecution.—*Young v. People*, 312.

The sufficiency of the preliminary proof of the death or absence of the witness is for the trial court. The finding of that court if fairly supported by the evidence will not be disturbed.—*Id.*

*View by the Jury*—That the jury viewed the premises in condemnation proceedings was taken into consideration in determining an appeal by the petitioner.—*Farmers' Co. v. Cooper*, 406.

*Judgment—Evidence Against Third Parties*—In an action to establish a mechanic's lien, the lien claimant must establish as against a mortgagee of the lands not only the indebtedness of the owner, but that his claim is of a character entitling him to a lien. Therefore a judgment recovered by the lien claimant against the owner is admissible against the mortgagee, and conclusive that the claim has been adjudicated against the owner. But, as against the mortgagee it is not conclusive as to the amount thereby awarded. And where the judgment against the owner is not pleaded by the lien claimant the mortgagee may assail it by evidence of payment made by the owners for which no credit was given by the lien claimant, in taking judgment.—*State Bank v. Plummer*, 144.

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*EVIDENCE—Continued.*

*Measure of Proof Required*—To contradict the sheriff's return of the service of *mesne* process, and the recitals of the record declaring service, the evidence must be clear, unequivocal, and sufficient to exclude all reasonable doubt.—*Pinnacle Co. v. Popst*, 451.

The return of the service of a summons was supported by the testimony of the officer who made it, and the attorney who directed it. Testimony of one of the defendants to the proceeding that eleven years prior to his deposition, and when he was a mere boy, necessarily having no conception of the purpose or effect of legal proceedings, he was not served with the summons, no circumstances being shown to fix the occasion in his mind, is not sufficient.—*Id.*

The question being whether the summons was served on the 22nd or 29th of the month, a certified copy from the docket kept in the sheriff's office, showing service on the latter date; the account kept by the keeper of the livery stable at the place of service, showing that the officer who made the return had a certain conveyance on the 29th, it not being shown for what purpose, and the statement of the officer, afterwards made, that whatever appeared in the sheriff's docket was true, *held*, insufficient to overthrow the return which showed service on the 22nd.—*Id.*

The officer's return is not to be impeached by a record kept in his office; nor by his statements orally made at a later date.—*Id.*

*EXECUTION.*

*Against the Body—Rescission of Contract for Fraud*—One who by fraudulent misrepresentation has been induced to enter into a contract may either have his action for the deceit, or rescind the contract and recover what he has paid. Relief in either form of action is grounded upon the allegation of fraud, and, prevailing in an action to rescind, he may, under the statute (Rev. Stat., sec. 3024), have execution against the body. The rescission of the contract is no waiver of the fraud.—*Springhetti v. Hahnewald*, 383.

*EXECUTORS AND ADMINISTRATORS.*

*Sale of Decedent's Lands—Petition*—The petition of an administrator for leave to sell the lands of his intestate for the payment of debts, which conforms substantially to the requirements of the statute is sufficient.—*Pinnacle Co. v. Popst*, 451.

*Decree—Presumptions*—It is presumed that the county court in directing the sale of an intestate's land, pursuant to the statute, found from evidence produced at the hearing that the personalty was not sufficient to discharge the decedent's debts, and this finding is not to be overthrown by evidence that the court was mistaken.—*Id.*, 451.

The personal estate of the decedent was shown by the inventory

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and appraisement to have a value largely in excess of his debts. The petition averred that this value was wholly prospective, the property, aside from certain exempt household goods, consisting of mining stock not susceptible of sale at any price. On bill in the district court to vacate the sale, the presumption was indulged that the court heard evidence and found this averment to be true.—*Id.*, 451.

*Relief in Equity—Evidence*—In the same case, there being no evidence that the action of the county court was found in fraud, *held*, that it was not competent to receive evidence that, in fact, there was no necessity to make sale of the real property to discharge the decedent's debts.—*Id.*, 451.

*Widow's Allowance a Debt*—The widow's allowance is a debt of the estate, for which, if the personalty be insufficient, the lands pertaining to the estate may be sold.—*Id.*, 451.

*Lands in Another State*—The county court has no jurisdiction to order a sale by an administrator of lands of the decedent, situated in another state. Such order is void.—*People v. Parker*, 604.

*Sale—Not Conforming to Decree*—The order directing a private sale, sale at public auction was approved.—*Pinnacle Co. v. Popst*, 451.

*Special Bond of Administrator Selling Lands—Liability of Sureties*—The bond required by statute (Rev. Stat. and Colo. Stat. Ann., sec. 7178) of an administrator directed to sell lands for the payment of the debts of the intestate, is for the protection of those interested in the estate, not the purchaser.

Void order for the sale of lands situated in another state, and sale accordingly; the sureties in the bond are not responsible to the purchaser.—*People v. Parker*, 604.

*Allowances*—Executors lawfully appointed and whose title, authority, and official conduct, is assailed by the beneficiaries under the will are justified in incurring any necessary legitimate expense in sustaining the validity of the will, and their appointments, and in defending, in good faith, their conduct while in office; and they are entitled to an allowance out of the estate for the amounts so necessarily and reasonably expended.—*Tuckerman v. Currier*, 25.

*Removal of Executor—Effect Upon His Character as Testamentary Trustee*—Where one is named as executor, and by the same will as trustee, the revocation of his appointment as executor will not necessarily revoke his appointment as trustee; but where powers and duties not pertaining to the office of executor are conferred by the will upon the executor, he becomes, by virtue of his appointment, a trustee by operation of law; and if he resigns or is removed as executor, the duties and powers conferred upon him, in that character terminate.—*Tuckerman v. Currier*, 25.

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*HOUSEHOLDER.*

*Right to Defend His Dwelling.* See CRIMINAL LAW.

*HUSBAND AND WIFE.*

*Right of Husband to Control Wife's Person*—The husband is not entitled to enter the house and premises of another, against the will of the householder, for the purpose of conferring with his wife, and persuade her to return to him; much less may he use force to compel such return.—*Bailey v. People*, 337.

*INJUNCTIONS.*

*Against Public Officer*—If a public officer is transcending his authority, and the resulting injury is not susceptible of reparation by proceedings at law, he may be restrained by injunction.—*Colorado Tax Commission v. Pitcher*, 203.

An injunction awarded to restrain an assessor from making an unlawful reduction in the assessment roll after its completion.

The provisions of Rev. Stat., sec. 5636, were held to be without application.—*Id.*

A public officer may be enjoined from doing what is expressly prohibited, even though no resulting injury is shown.—*Id.*

*To Restrain Public Work*—The city of Denver has the unquestionable right to construct or cause to be constructed in the public streets, viaducts and approaches thereto. That a structure, erected under proper legislative and municipal authority may so interfere with the access to private property as to entitle the owner to compensation does not afford him an injunction to restrain the erection of it until compensation is made.—*Albi Co. v. Denver*, 474.

*INKEEPER.*

*Liability to Guest.* See NEGLIGENCE.

*INSTRUCTIONS.*

*Objections and Exceptions To*—The rule prescribed in *Hasse v. Herring*, 36 Colo. 383, has no application to an instruction which contains but one proposition of law, and the objection calls the attention of the court to that particular proposition; nor to a case where each of several instructions contains a single proposition and objection is made to each separately, e. g., where in an action for an injury attributed to the negligence of defendant an inn-keeper, in providing for plaintiff a defective chair, an instruction which imposed upon plaintiff the burden to establish "that defendant invited plaintiff to sit in a chair which was unsafe and out of repair and known to defendant" to be so, prior to the happening of the accident and that the injury was

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*INSTRUCTIONS—Continued.*

"the natural and probable result of such negligent act of defendant" was held to present only a single proposition, to which a general objection was sufficient.—*France v. Goryot*, 30 Colo. 227, and *National Fuel Co. v. Green*, 50 Colo. 307, distinguished.—*Burchmore v. Antlers Co.*, 314.

*Assuming a Fact in Issue*, e. g., in an action for an injury attributed to a defective chair negligently provided for plaintiff, a guest in defendant's hotel, an instruction was permitted the jury to find for the plaintiff, if the chair was defective, and defendant "*had it used reasonable care*" would have known of the defect, even though it had no actual notice thereof, is properly refused, because assuming a want of reasonable care on the part of the defendant.—*Burchmore v. Antlers Co.*, 314.

*Conflicting—Not Warranted by Evidence—Shifting Burden of Proof*—Instructions which are directly in conflict, upon a material question, constitute fatal error.—*Nutt v. Davison*, 586.

So instructions which are directed to a supposed state of facts not established by the evidence.—*Id.*

Or an instruction which devolves upon one party the burden of proof which the law imposes on the other.—*Id.*

*Repetition*—Unnecessary repetition in the charge to the jury, though reprehensible, is not necessarily error; e. g., the frequent repetition of the phrase "verdict for the defendant" is not prejudicial, where the facts warranting such a verdict are clearly defined.—*Lintz v. Denver Co.*, 371.

*To Be Construed As a Whole*—Where the law of the case is clearly and explicitly set forth in one point of the charge the effect of equivocal language elsewhere therein is eliminated.—*LeMaster v. People*, 415.

*In Criminal Cases.* See CRIMINAL LAW.

*INTEREST.*

*Liability of Surety For*—The later authorities, and the preponderance of authority, is to the effect that in an action against the surety for performance of an executory contract, interest may be allowed, even though the effect is to exceed the penalty of the bond. The allowance is made, however, not as part of the debt, but as damages for its detention.—*Empire Co. v. Lindenmeier*, 497.

But where the surety has no knowledge of the default a demand must be made, and interest is allowed only from the time of such demand.—*Id.*

*JUDGMENT.*

*Void or Voidable—Collateral Attack*—A decree rendered by a court which has not acquired jurisdiction, and where this absence of juris-

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diction appears by the record, is void, and may be assailed directly or collaterally.

If there be any jurisdictional infirmity, not apparent by the record, the judgment is voidable merely, and in full effect until reversed, set aside, or declared void, in an action brought to try the very question.

Mere error or irregularity though sufficient to reverse the decree on appeal or error brought, has not the effect to render it void.

Where a court proceeds to hear and determine a cause without service made for the period prescribed by statute for defendant's appearance, the judgment is void.—*Pinnacle Co. v. Popst*, 451.

A bill to impeach a decree directing the sale of an intestate's lands, for the payment of his debts, is, as to third persons who have subsequently acquired such real estate, a collateral attack.—*Id.*

*When Res Judicata*—A judgment of the district court determined that plaintiff was the county superintendent of schools for the city and county of Denver and entitled to the salary prescribed by the general law. Subsequent to this she was chosen superintendent of schools for that territory, under the city charter, qualified under such election, and served for some months, accepting the salary prescribed by the charter. She then brought an action to recover the salary prescribed by the general law for this period, less the sum she had already received under the charter provision. *Held*, that the former judgment was not *res judicata* of the questions presented in her new action, as an entirely different state of facts was involved, presenting different parties, different subject matter and new issues.—*Denver v. Meyer*, 96.

*Effect as Against Those Not Parties*—In a proceeding to establish a mechanic's lien, against both the owner of the lands and a mortgagee, the lien claimant must establish as against the mortgagee, not only the indebtedness of the owner, but that his claim is of a character entitling him to a lien. Therefore a judgment recovered by the lien claimant against the owner is admissible against the mortgagee, and conclusive that the claim has been adjudicated against the owner. But, as against the mortgagee it is not conclusive as to the amount thereby awarded. And where the judgment against the owner is not pleaded by the lien claimant the mortgagee may assail it by evidence of payment made by the owners for which no credit was given by the lien claimant, in taking judgment.—*State Bank v. Plummer*, 144.

*Vacating—Summons not Personally Served*—Whether upon application under section 81 of the code a judgment rendered without personal service shall be vacated, is in the discretion of the court.

The action was instituted in January, 1911, and judgment entered July 20th, A. D. 1911, upon publication of the summons. The clerk of the court had mailed a copy of the summons and complaint to defendant, at the address given in the affidavit for publication. The motion to vacate the judgment was filed February 11th, A. D.

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*JUDGMENT—Continued.*

1912. No explanation was given of this delay. The affidavit in support of the motion failed to show that defendant was ignorant of the pendency of the cause, nor that he failed to receive the copy of the summons and complaint, nor that the address given in the affidavit for publication was not his address. The affidavit was held insufficient, and the motion properly denied.—*Fullen v. Wunderlich*, 349.

*Record Construed*—The record declaring that plaintiff elected to "stand upon his replication" held to show that a demurrer thereto was sustained.—*Castner v. Gray*, 551.

*JUDICIAL SALE.*

*Purchaser's Intent*, immaterial.—*Pinnacle Co. v. Popst*, 451.

*JURY.*

*Summoning—Open Venire*—Under the statute the court may order a jury drawn from the box or summoned by an open venire. Unless prohibited by statute this power is inherent in the courts at common law.—*Mitsunaga v. The People*, 102.

*LIBEL.*

*Charge of Bribery*—To falsely publish of another anything tending to bring him into odium is libelous *per se*, *e. g.*, that the person mentioned had been guilty of corrupting a jury, in a cause pending in another state, and this, whether the act was or was not a criminal offense, by the law of such other state.—*Burns v. Republican Co.*, 100.

*LIMITATIONS.*

*Color of Title—Good Faith*—A deed void upon its face is sufficient color of title to set in motion the seven-year limitation act (Rev. Stat., sec. 4087). But it is not conclusive of the good faith of the party claiming thereunder. Affirmative evidence may be produced that the party claiming under such a conveyance, and asserting the defense of the statute, was conscious of the infirmity of his title, and while making payment of taxes, sought, by shifting the title through conveyances not recorded, to prevent the paramount owner from effectually assailing it. One so conducting himself will be denied the benefit of the statute.—*Silford v. Stratton*, 248.

*Payment of Taxes*—A treasurer's deed is not color of title until recorded. One who, claiming under a void tax deed, would avail of the seven-year limitation prescribed by Rev. Stat., sec. 4090, must show the lapse of the statutory period, not only between the first payment of taxes and the institution of the action of the paramount owner, but between the record of his deed and the institution of this action.—*Marks v. Morris*, 186.

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*LIMITATIONS—Continued.*

*Cloud Upon Title*—Section 4073 of the Revised Statutes, applies to personal actions only and is no bar to a bill to remove a specific cloud upon the title to land.—*Empire Co. v. Zehr*, 185.

*MECHANICS' LIENS.*

*For What Demands a Lien Is Allowed*—Where by the contract plaintiff was employed as superintendent, etc., at a monthly salary, "and his expenses," the expenses were held to be as much a part of his compensation as the stated monthly allowance. But only such expenses as are incurred in the work for which he was employed are allowed to him.—*State Bank v. Plummer*, 144.

*Material Furnished But Not Actually Used*—Under sec. 4025 of the Revised Statutes, one who, acting in good faith, supplies material for the erection of a building at the instance of the principal contractor therefor, is entitled to a lien for the value of such material, even though some of such material went into another structure, and some was sold by the contractor.—*Salzer Co. v. Lindenmeier*, 491.

*Material Furnished Without Any Specific Agreement*, as to the use to be made thereof; or to what building it is to be applied, gives no lien.—*Id.*

*Applies to a Leasehold in Land*—One furnishing material for the improvement of real property by contract with one having a mere leasehold, is, under the statute (Rev. Stat., sec. 4027) entitled to a lien upon such leasehold estate.—*Horn v. Clark Co.*, 522.

An agreement between the landlord and tenant that the latter may remove the structures which he erects, or the improvements which he places upon the demised premises, has no effect to change the character of such structures, as against third persons.

The tenant had purchased from the lien claimant a boiler, engine, and other machinery and appliances, and erected the same in a building situated upon the leasehold. His intention was that the whole should constitute, and be operated as, a mill for the treatment and reduction of ore. The machinery and appliances were necessary to accomplish this purpose. *Held*, that they thereby became part of the leasehold and were not, as against the lien claimant, liable to be sold as personalty on execution against the tenant.—*Id.*

*Time of Filing Statement of Lien—Single or Several Contracts*—The defendants, a railway company, and a tunnel company projected a railway, one terminus of which was in the mountains, and the other in the plains, and a tunnel, to be part of such railway. The work was projected and planned as an entirety. There were three lien claimants, one an engineer, a part of whose claim was for general superintendence at a monthly salary, and other portions of it for the construction of particular parts of the tunnel, and laterals thereto, under separate

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*MECHANICS' LIENS—Continued.*

contracts, and materials furnished in and for such construction. Another claimant had furnished material during different stages of the work, some to the defendant companies, directly, and some to the engineer while performing his contracts. The third claimant had sold and delivered ore cars to the railway company while work was proceeding in the tunnel. The last delivery made by this company was in 1903. There was no cessation of work upon the railroad and tunnel, for the period of thirty days, from a date prior to December 1st, 1902, to July 1st, 1905. Neither the railroad nor the tunnel had been completed at the time of the trial. All the lien claims were filed in the early days of July, 1905. *Held*, that as the completion of the tunnel as an entirety was planned in the beginning, and all the work was performed and all the material furnished in furtherance of this general design, what was done under these several contracts was not to be regarded as a separate structure or thing, nor were the several contracts to be regarded as distinct, for the purposes of the lien; that the liens attached to the railroad and tunnel as a whole, and that the several claims or statements of lien of the claimants were filed in apt time.—*State Bank v. Plummer*, 144.

*Date of Completion of Building*, settled by the opinion in *Curtis v. McCarty*, 53 Colo. 284.—*Curtis v. Nunns*, 554.

*Acceptance of Building by Owner from Contractor*, does not set in course the statute prescribing the time in which a sub-contractor must proceed to enforce his lien.—*Id.*, 554.

*Relation of Claim to the Beginning of the Work*—Under Rev. Stat., sec. 4030, the lien relates to the beginning of the work and is preferred to a mortgage subsequently recorded.—*State Bank v. Plummer*, 144.

*Failure to Record Contract—Effect*—Where the sum to be paid by the owner for the erection of the building exceeds $500.00, and he fails to cause such contract to be recorded as required by sec. 4025, Rev. Stat., every sub-contractor, material man, etc., is placed in the position of principal contractor, so far as relates to his claim of lien, and no notice of his lien is required to be served on the owner, under Rev. Stat., sec. 4033.—*Curtis v. Nunns*, 554.

*Parties*—In an action by a material man or sub-contractor the original contractor must be made party; and if a mortgagee is joined the owner must also be made party.—*State Bank v. Plummer*, 144.

Where the lien is asserted only against the leasehold interest of the tenant, his landlord is not, under sec. 4035, Rev. Stat., a necessary party.—*Horn v. Clark Co.*, 522.

*Decree—In Part for Things Not Lienable*—A decree awarding a lien, in part for things not the subject of a lien under the statute, fails only to the extent of those matters as to which the allowance is improper.—*Horn v. Clark Co.*, 522.

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*MECHANICS' LIENS—Continued.*

*Judgment Against Owner—Evidence Against Mortgagee*—The lien claimant must establish as against the mortgagee, not only the indebtedness of the owner, but that his claim is of a character entitling him to a lien. Therefore a judgment recovered by the lien claimant against the owner is admissible against the mortgagee, and conclusive that the claim has been adjudicated against the owner. But, as against the mortgagee it is not conclusive as to the amount thereby awarded. And where the judgment against the owner is not pleaded by the lien claimant the mortgagee may assail it by evidence of payment made by the owners for which no credit was given by the lien claimant, in taking judgment.—*State Bank v. Plummer*, 144.

*MONOPOLIES.*

*Discountenanced*—The law regards with high disfavor any condition that tends to stifle competition in the necessities of life, or in those things which contribute to the general comfort and welfare, and where such condition is asserted the court will make most careful and diligent inquiry to ascertain the very truth of the matter.—*Barrows v. McMurtry Co.*, 432.

*Evidence*—That a dealer, after purchasing the stock and good will of the competitor, advances the price of the commodity which is the subject of his business, is not sufficient of itself to establish an improper motive as animating his purpose. The question is best determined by the prices demanded by other dealers in the same commodity within the same territory, and the effect of the new quotations upon the general market.

Where after the purchase there still remained in the same field many competitors, and the defendant himself, shortly after disposing of his stock, again engaged in the same line of trade, in violation of his covenant, the contention that the purchase in question tended to create a monopoly was held to be entirely overthrown.—*Id.*, 432.

*MUNICIPAL CORPORATIONS.*

*Ordinances—Publication*—The statute (Rev. Stat., sec. 6673) provides that all by-laws of a town imposing a fine, etc., shall be published in a manner specified, and "shall not be in force until the expiration of five days after they have been so published." An ordinance declared the keeping for sale of any intoxicating liquors a nuisance, and that the same "may be abated as any other nuisance." The provision quoted was never published. *Held*, that such provision never became of force, and a judgment convicting the accused party of maintaining a nuisance, and directing the abatement of such nuisance, is no justification for acts done pursuant thereto.—*Wolfe v. Abbot*, 531.

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*MUNICIPAL CORPORATIONS—Continued.*

*Prosecution—Conviction of Offense Not Charged*—Charge of "selling and keeping liquor for sale." Conviction of "maintaining a nuisance," a fine imposed, and abatement of the nuisance ordered. The conviction is void.—*Wolfe v. Abbott*, 531.

*Power to Abate Nuisances*—Paragraph 45 of sec. 6525 of the Revised Statutes is not self-executing. The power granted must be exercised through an ordinance. The power granted by paragraph 53 of the same section, to prohibit "within one mile beyond the outer limits of the town any unwholesome or offensive business," has no application to places for the keeping or sale of intoxicating liquors, but only to such things as are offensive, or unwholesome within the ordinary use of the term, e. g., slaughter houses, pig-sties, feeding places, and the like; and even conceding the application of the provision to places kept for the sale of intoxicating liquors, it confers no power to declare such establishments beyond the limits of the town a nuisance.—*Wolfe v. Abbott*, 531.

*Manner of Exercising the Power*—The procedure for enforcing an ordinance prohibiting the sale of intoxicating liquors should be regulated by ordinance. If such establishments are declared a nuisance one charged with the offense should be prosecuted and tried on the specific accusation of maintaining a nuisance. The manner of effecting the abatement should be prescribed, and the order of abatement should conform to the ordinance, and the manner of proceeding should not be left to the discretion of the officer.—*Id.*, 531.

*Action for Personal Injury—Notice*—Where in an action against a municipal corporation for a personal injury attributed to its negligence, it appears that notice in writing, in all respects sufficient, was served upon the mayor in due time, that he accepted it and waived the service of further notice, and that the council within the statutory period considered such notice and acted thereon in their official capacity, the purpose of the statute (Rev. Stat., sec. 6661) is accomplished, and the plaintiff's failure to serve notice upon the clerk does not defeat the action.

*Notice to the Clerk*, affects the city, though the clerk fail to communicate it to the council.—*Id.*

*NEGLIGENCE.*

*Reasonable Care*—An inn-keeper invites his guest to occupy a chair, which by reason of its defective condition collapses, precipitating the guest to the floor. The inn-keeper is liable if by reasonable care he would have known of the defect, even though he had no actual knowledge thereof.—*Burchmore v. Antlers Co.*, 314.

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*NEGOTIABLE INSTRUMENTS.*

*Alteration of—Filling Blanks—Effect*—A promissory note, blank as to the rate of interest and the time from which interest is to be computed, is subscribed by the principal maker, and the sureties, and delivered by the principal to the payee named therein. The payee, without authority of the sureties, fills the blanks and advances money thereon to the principal. The alteration is a material one, and the instrument is thereby avoided.—*Ayres v. Walker*, 371.

*NEW TRIAL.*

*Verdict Not Conforming to the Evidence*—A verdict must be supported by the evidence, and consistent with some legitimate theory of what the testimony tends to establish. If wholly at variance with the testimony and the theory upon which the cause was tried, it should be vacated.—*Galligan v. Luther*, 118.

*Improper Remarks to Jurors*, which manifestly had no effect upon their deliberations is not ground for a new trial.—*Liutz v. Denver, Co.*, 371.

*Treating Jurors*—That the attorney of the successful party treated four of the jurors to cigars, after the verdict, merely in a way of civility, and without any design or forethought, *held*, no ground to vacate the verdict, though the court suggested that, upon ethical grounds the act of the attorney was indiscreet.—*Id.*

*Affidavits of Jurors*, as to the ground upon which the verdict was reached, will not, as a general rule, be received to impeach it.—*Id.*, 371.

*OFFICER.* See PUBLIC OFFICER.

*PARTIES.*

*Necessary—Defendants*—In an action by a material man or subcontractor to enforce a mechanic's lien the original contractor must be made party; and if a mortgagee is joined the owner must also be made party.—*State Bank v. Plummer*, 144.

*Joint Tort Charged Against Several—Recovery Against One*—On complaint charging a joint tort against several, and evidence convicting one or part of the defendants, plaintiff may have judgment against those shown to be guilty, the others being acquitted. Plaintiff is not required to elect and discontinue as to those against whom no case is made.—*Denver v. Gast*, 16.

*Misjoinder—How Availed of*—A demurrer for a misjoinder of plaintiffs is overruled. Defendants answer and proceed to trial. The misjoinder is waived.

Misjoinder of plaintiffs, not appearing by the complaint, may be taken advantage of by answer. If not so brought in question it is waived (Mills' Code, sec. 55, Rev. Code, sec. 61).—*Springhetti v. Hahnewald*, 383.

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*PLEADING.*

*Construction*—The reply may be referred to to determine plaintiff's then understanding of the averments of the answer.

Plaintiff sought to charge a carrier with the loss of a trunk. The answer admitted that at the day and place mentioned in the complaint some person unknown to defendant delivered to it a trunk, but "whether plaintiff was the owner of the trunk * * * defendant has not and cannot obtain sufficient information, etc." *Held*, the burden was upon the plaintiff to show that he was the owner of the trunk, and that an instruction to the effect that defendant admitted by its answer that he had received plaintiff's trunk, was error.—*Denver Co. v. Gast*, 16.

*Construed*—Complaint for an injury attributed to the negligence of defendant, an inn-keeper, in providing for plaintiff, a guest at his hotel, a defective chair, alleged that the defect was "known to defendant," before and at the time, etc. *Held*, to admit evidence that the defendant would have known of the defect, if reasonably diligent.—*Burchmore v. Antlers Co.*, 314.

A complaint upon a bond given in certain appeals from a magistrate's court to the county court averred that after such removal of the causes to the county court each of "said actions" was dismissed. In view of other allegations manifestly importing that the causes were still depending, "actions" was construed to mean "appeals."—*National Surety Co. v. People*, 365.

The bond provided that the principal should pay any judgments that might be rendered upon dismissal or trial of the appeals, "or" surrender herself in satisfaction thereof. The complaint averring simply non-payment of the judgments, without specifically negativing the condition following the disjunctive "or," was held sufficient. The surrender of the principal would have satisfied the judgments, and they would not have remained "due and unpaid," as the complaint alleged.—*Id.*

*Prayer*—Relief is to be confined to what, upon the facts stated, the party is entitled to.—*Tuckerman v. Currier*, 25.

*Amendment*—An amended complaint is not to be filed without leave of the court.

A judgment rendered after a trial had without notice to the defendant, upon an amended complaint filed without leave, and increasing the plaintiff's damages, should be vacated on motion.—*Galligan v. Luther*, 118.

Action against a carrier for the loss of baggage, the complaint alleging a contract to transport to a particular city, an amendment alleging an agreement to carry to a different city does not state a new cause of action.—*Denver Co. v. Gast*, 20.

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*PLEADING—Continued.*

*Answer—General Denial*—The general denial casts upon the plaintiff the burden of establishing all the material allegations of the complaint, regardless of the other defenses in the answer.—*Denver Co. v. Gast*, 16.

*Inconsistent Defenses*, may be presented in the same answer.—*Id.*

*What Must Be Specially Pleaded*—In a proceeding to enforce a mechanic's lien the owner of the premises and a mortgagee thereof were made defendants. Judgments recovered by the lien claimants against the owner, were, though not pleaded, admitted in evidence as against the mortgagee. *Held*, that if excessive in amount they were to this extent a fraud upon the mortgagee, and the mortgagee having had no opportunity to plead this defense it was not to be excluded for the failure to plead it.—*State Bank v. Plummer*, 144.

*Waiver*—Uncertainty or ambiguity in a pleading if not assailed by demurrer or motion is waived.—*National Surety Co, v. The People*, 365.—*Powers v. Boulder*, 558.

A demurrer for a misjoinder of plaintiffs is overruled. Defendants answer and proceed to trial. The misjoinder is waived.—*Springhetti v. Hahnewald*, 383.

Misjoinder of plaintiff's, not appearing by the complaint, may be taken advantage of by answer. If not so brought in question it is waived (Mills' Code, sec. 55, Rev. Code, sec. 61).—*Id.*, 383.

*Judgment on the Pleadings*—Where the reply admits the substantial averments of a sufficient answer defendant is entitled to judgment on the pleadings; and a judgment accordingly, is not erroneous even though a demurrer pending to the replication remains undisposed of.—*Castner v. Gray*, 551.

*PRACTICE.*

*Appearance—Effect*—Objection to the return of process must be made *in limine*, by plea in abatement, or motion. An answer to the merits waives it.—*Salzer Co. v. Lindenmeier*, 491.

*Bill of Particulars*—It seems to be the general rule that in proceedings to enforce a mechanic's lien, where the work was done for a stipulated price, no bill of particulars is required.

But where the contract entitled plaintiff to a certain monthly stipend "and his expenses" the defendant may require detailed information, concerning such expenses. So where the demand is for "material furnished."—*State Bank v. Plummer*, 144.

*Judgment—Joint Tort Charged Against Several—Recovery Against One*—On complaint charging a joint tort against several, and evidence convicting one or part of the defendants, plaintiff may have judgment against those shown to be guilty, the others being acquitted. Plaintiff is not required to elect and discontinue as to those against whom no case is made.—*Denver v. Gast*, 16.

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*PRACTICE IN SUPREME COURT.*

*Presumptions*—Unless the contrary appears it will be presumed that the inferior court was acting within its jurisdiction.—*Larimer County v. Annis*, 331.

*What May be Assigned for Error*—A county having refused to pay the allowances made by the district court to the referee in a proceeding to adjudicate the priorities to the use of water, that court ordered each of the persons and corporations affected by the decree to pay into court their proportionate shares of the amount awarded to the referee, to be refunded to them if the award to the referee should be affirmed. *Held*, that the county was not affected thereby and would not be heard to complain thereof.—*Larimer County v. Annis*, 331.

*Questions not Presented Below*, will not be considered in the court of review. And the court will refer to the opinion of the court below, when found in the record, to determine what questions were there agitated.—*Willison v. Cooke*, 320.

Questions not presented below will not be considered in this court, even though upon application to vacate a judgment, and the objection goes to the jurisdiction of the court.—*Fullen v. Wunderlich*, 349.

*Harmless Error*—To admit evidence of a confession or statement of the accused is not injurious, where testifying on his own behalf, he makes substantially the same statement.—*Mitsunaga v. People*, 102.

So where, the prisoner being charged with murder, his counsel called upon the prosecutor to produce certain clothing of defendant, in order to show that it bore no blood-stains. It did not appear that the prisoner wore the clothes in question while at the scene of the homicide, and the chief of police, to whom they had been delivered, testified that they showed no blood-stains. *Held*, that the failure to require their production was harmless.—*Id.*, 102.

Plaintiffs, by false representations of defendants, had been induced to purchase from one of them an interest in a leasehold of a worthless mine, and from the other an interest in an option from the owner of the same premises. Under this option so assigned to them, plaintiffs moved by the same false representations, had purchased an interest from the owner, paying therefor a large sum of money. In an action by plaintiffs to rescind the transaction the district court allowed them the money obtained by defendants, but refused to make any award in respect of what had been paid by plaintiffs to the owner. This was assigned for error, as permitting a rescission in part; it being contended that plaintiffs should have been required to restore to the defendant owning the option, what they had purchased thereunder. *Held*, that as this would have required defendants to pay plaintiffs a large sum of money for what was of no value, the error if any was to the advantage of defendant, and not prejudicial.—*Springhetti v. Hahnewald*, 383.

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*PRACTICE IN SUPREME COURT—Continued.*

The admission of evidence cures any error in its previous exclusion.

The admission of evidence having no bearing upon the matter in issue is harmless.—*LeMaster v. People*, 415.

*Verdict on Conflicting Evidence*, will not be disturbed.—*Denver Co. v. McDonough*, 515.

*Mandate—Must be Obeyed*—An appeal from a judgment pursuing a mandate of this court awarded upon the judgment in a former appeal will be dismissed.—*Elder v. Wood*, 236.

*New Pleadings in Supreme Court*—Bill for an injunction, dismissed in the district court. A petition filed in the supreme court praying a temporary injunction or restraining order was disregarded.—*Denver v. Pitcher*, 208.

*Original Investigation of Confession of Error Filed*—Upon confession of errors filed, the court of its own motion appointed a commissioner to investigate the circumstances attending the filing of this plea, and report thereon.—*Coryell v. Fawcett*, 353.

*Writ of Error Sued Out Collusively*, and under a precedent agreement that the defendant in error shall confess errors, the controversy of the parties being adjusted, and the real purpose being to vacate an allowance to the attorneys for their fees, will be dismissed. Such proceeding is a fraud upon the attorneys and an imposition upon the court.—*Coryell v. Fawcett*, 353.

*PRECEDENTS.*

*Effect*—Expressions of the court upon a question incidentally presented are without authority.—*Young v. People*, 293.

*PRINCIPAL AND AGENT.*

*When the Relation Exists*—Defendants had employed one P. to find a purchaser for certain lands. After nearly two years had elapsed, no sale having been effected, a corporation was organized, and P. having become its manager, and having applied to defendants on behalf of the corporation to know if the price previously specified still controlled, defendants listed with him the same, and other lands. Defendants had no knowledge upon this occasion, of the organization of the corporation, nor that P. was acting on its behalf. *Held*, that defendant's ignorance in no manner affected the right of the corporation to recover commissions upon a sale subsequently made, and of which it was the efficient cause.—*Satisfaction Co. v. York*, 566.

*Agent's Authority—Presumptions*—There is a presumption that a known agent acts within his authority. Defendant, a surety company, by its local agent delivered to a magistrate an appeal bond. The magistrate rejected it as not in form, requiring certain changes. The agent

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*PRINCIPAL AND AGENT—Continued.*

returned the bond, with modifications which changed the character of the obligation, writing to the magistrate that he "had corrected the bond," and that it would be delivered by the appellant's attorney. It was so delivered and accepted by the magistrate. The local agent was employed for the purpose of obtaining such business. It was his duty to furnish similar bonds whenever satisfactory opportunity presented itself. He had the apparent as well as the real authority to deliver the bond of the company. It was *held*, that the magistrate had the right to presume that the agent was acting within his authority, and that the company should not be heard to deny the bond, in view of the fact all that the agent did was, to all appearance, what he was authorized to do.—*National Surety Co. v. The People*, 365.

*PRINCIPAL AND SURETY.*

*Surety Company—Character Of—Contracts How Construed*—The doctrine that a surety is a favorite of the law, and that a claim asserted against him is *strictissimi juris* has no application to a bond, executed upon consideration, by a corporation organized to execute such bonds for a profit. Such a corporation is in effect an insurer; its contracts are, as a rule, in terms prescribed by the corporation itself, and should be construed most strongly in favor of the obligee.—*Empire Co. v. Lindenmeier*, 497.

*Contract for Erection of Building—Surety Liable for Liens*—The contractor for the erection of a building agreed to "furnish all materials and do all the work," etc. Defendant became surety for such contractor. *Held*, that defendant was liable for the amount of a lien established against the building for material furnished the contractor, though the owner had not discharged such lien.—*Id.*

*Interest—Exceeding Liability of Surety*—The later authorities, and the preponderance of authority, is to the effect that in an action against the surety for performance of an executory contract, interest may be allowed, even though the effect is to exceed the penalty of the bond. The allowance is made, however, not as part of the debt, but as damages for its detention.

But where the surety has no knowledge of the default a demand must be made, and interest is allowed only from the time of such demand.—*Empire Co. v. Lindenmeier*, 497.

*Institution of Suit*, is a sufficient demand. Interest from that date, only, is allowed where the creditor is entitled to interest only upon demand, and no demand is shown.—*Id.*

*PROCESS.*

*Return—Evidence to Contradict*—To contradict the sheriff's return of the service of *mesne* process, and the recitals of the record declar-

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ing service, the evidence must be clear, unequivocal, and sufficient to exclude all reasonable doubt.

The return of the service of a summons was supported by the testimony of the officer who made it, and the attorney who directed it. Testimony of one of the defendants to the proceeding that eleven years prior to his deposition, and when he was a mere boy, necessarily having no conception of the purpose or effect of legal proceedings, he was not served with the summons, no circumstance being shown to fix the occasion in his mind, is not sufficient.—*Pinnacle Co. v. Popst*, 451.

The question being whether the summons was served on the 22nd or 29th of the month, a certified copy from the docket kept in the sheriff's office, showing service on the latter date; the account kept by the keeper of the livery stable at the place of service, showing that the officer who made the return had a certain conveyance on the 29th, it not being shown for what purpose, and the statements of the officer, afterwards made, that whatever appeared in the sheriff's docket was true, *held*, insufficient to overthrow the return which showed service on the 22nd.—*Id.*, 451.

The officer's return is not to be impeached by a record kept in his office; nor by his statements orally made at a later date.—*Id.*, 451.

*PROHIBITION.*

*Not a Writ of Right*—Whether it shall be granted rests in the sound discretion of the court.

*Diligence Required*—One who acquiesces in a judgment or order will not afterwards be allowed a writ of prohibition to restrain action thereunder.

On the 7th of February, A. D. 1911, in the district court, receivers were appointed for a corporation alleged to be possessed of valuable properties, but largely indebted and without ready means to discharge pressing debts, or accumulating taxes, or to operate its property. The bill upon which the appointment was made alleged not only these matters, but that if creditors were allowed to proceed with their actions, dissipation and waste of the corporate assets would result, to the injury of both creditors and stockholders. On the first of March succeeding, other creditors and stockholders applied for leave to intervene in the cause, alleging that the receivers were appointed without notice, that the attorney who assumed to appear for the corporation and consent to the appointment, acted without authority, and that the bill was without equity. This application was denied on March 11, A. D. 1911. No exception was taken to the ruling, and no further action had until January 6th, A. D. 1912, when the same creditors and stockholders presented a second petition for leave to intervene,

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setting forth their first petition and the action taken thereon, reiterating its statements, and alleging that in denying such original application the court was influenced by representations made at the time of the receiver's appointment, that a person named would shortly raise the means necessary to pay the pressing liabilities of the company, and enable it to operate its properties, and become a going concern; that none of these assurances had been carried out; that the person making them was without means of his own, and unable to raise money from other sources, and that the appointment of the receivers was procured merely to harass the creditors and stockholders of the company, and constrain them to part with their demands, and their shares at a great sacrifice. Delay in the presentation of the second petition was excused by the suggestion that the petitioners had been advised that it would be improper and unavailing for them to renew their application until a reasonable time had elapsed for the fulfillment of the promises and assurances made to the court as above stated. This petition was denied on January 6th, A. D. 1912. On the 22nd of January, 1913, application was made in this court, for a writ of prohibition, restraining the district court from further proceeding under the order appointing the receivers, and for other relief. *Held*, that the delay intervening between the denial of the first petition and the presentation of the second was an aquiescence in the appointment of the receivers, and that such acquiescence, and the long delay succeeding, before the application of this court, were sufficient to warrant the court in refusing to enter into the merits of the controversy, by the writ of prohibition.—*People v. District Court of Sixth District*, 576.

*Not a Writ of Error*—Whether the superior court exercised its authority correctly or erroneously is not to be inquired into.—*People v. District Court*, 240.

*PROMISSORY NOTES.* See NEGOTIABLE INSTRUMENTS.

*PUBLIC OFFICER.*

*Violation of Public Duty—Liability to Private Action*—The statute directing the county clerk to publish, prior to every election, the list of all nominations (Rev. Stat., sec. 2159) prescribes a public duty, for the benefit of the public only. It imposes upon the clerk no duty towards the publisher of any newspaper, and his refusal to make such publication in the only daily newspaper of the county affords no action to such publisher.—*The People v. Hoag*, 542.

*Fees*—Where fees are the only compensation allowed by law to a public officer for the discharge of his official duties, he is not entitled to compensation for the discharge of duties for which no fee is pre-

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*PUBLIC OFFICER—Continued.*

scribed. The performance of such duties without compensation is a burden which the officer assumes when he accepts the place.—*McGovern v. Denver*, 411.

*RAILROAD COMMISSION.*

*Powers*—An order of the railroad commission requiring a railroad company to resume the operation of a branch of its railroad which it had abandoned, to operate passenger trains daily except Sundays, and three freight trains weekly, approved, and the decree of the district court enforcing the order affirmed.—*Colorado &c. Co. v. Railroad Commission*, 64.

*RAILROAD COMPANIES.*

*Duty to Operate Constructed Lines*—Whether a railway company can be compelled to construct the line which it has adopted in its charter, *quaere*.

But a railway company may, where the public interest requires, be compelled to resume the operation of a part of its constructed line which it has abandoned, even though in fact such operation may be at a loss.

The railway company claiming that the operation of a particular branch or part of its railway will be unprofitable has the burden of proof.

The evidence examined, and held that the railway company had not sustained this burden.

The question of loss must be considered in connection with the duties of the railway company to the public, and the result of its corporate business, as a whole; it is not to be excused from performing its whole duty, merely because by ceasing to operate a part of its system the net returns will be increased.—*Colorado &c. Co. v. Railroad Commission*, 64.

*Liability for Fire Negligently Set Out—Limitation*—Section 5512 of the Revised Statutes does not create or include a liability founded upon negligence. It is cumulative to the common law. The limitation of two years there prescribed has no application to an action founded on negligence in setting out a fire.—*Smith v. Denver & Rio Grande Co.*, 288.

*SALE.*

*Option to Return—Effect*—Where goods are purchased with an option to return them, the title passes, subject to the right to rescind and return.—*Steinhauer v. Henson*, 426.

*Option to Purchase*—In the case of a mere option to purchase the title remains in the one granting such option: the delivery of the

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*SALE—Continued.*

goods to the one receiving the option is a mere bailment. If the bailee fails to exercise his option within a reasonable time, where no time is specified, the bailor may recall the goods.—*Id.*, 426.

*Duty of Seller*—One who has granted to another an option to purchase an article, no time being appointed for its return, or for the exercise of the option, shortly thereafter closes his place of business, goes abroad, and so remains till after the death of the optionee. He is not to be heard to complain of the failure of the optionee to return the article, nor will the option be converted into a purchase by such failure.—*Id.*, 426.

Whether the optionee was under duty to take affirmative action, and return the goods, *quaere.*—*Id.*, 426.

*Purchaser Refusing to Accept an Article Manufactured for Him According to His Plans—Damages*—The rule is practically universal in this country that where a purchaser refuses, without legal justification, to accept an article manufactured to his order, after special design, the vendor may, at his election, hold the article for the purchaser and recover the contract price with interest.—***Bond v. Bourk***, 51.

And the purchaser is not allowed advantage of the non-performance by the vendor of conditions, the performance of which he himself has prevented, *e. g.*, where, the article being a soda fountain, the defendant has refused to permit the plaintiff to install it, as the contract required.—*Id.*

Nor will the purchaser be allowed the benefit of a stipulation that some part of the price shall be paid in installments, at future times specified.—*Id.*

The tender of the article, and plaintiff's election to sue for the contract price, vests title in defendant for the purposes of the action. —*Id.*

*STATUTES.*

*Construction*—A statute which is essentially remedial, *e. g.*, the act creating the railroad commission (Laws 1910, c. 5), is to be liberally construed to accomplish its object.

The title of an act may be resorted to to aid in ascertaining the legislative intent.—*Colorado &c. Co. v. Railroad Commission*, 64.

Where identical words occur in different parts of a statute the same meaning is to be ascribed to them in each case, unless it clearly appears that a different meaning was intended, *e. g.*, "game," "gaming," and other like words in the different sections of the criminal code against gambling are to be received in the same sense. *Coreon v. Neatheny*, 9 Colo. 212, approved and followed.—***Everhart v. People***, 272.

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*STATUTES—Continued.*

In the construction of a statute all provisions pertaining to the same subject are to be taken together.

In construing the proviso to sec. 1, of the act for the organization of irrigation districts (Laws 1901, c. 87) the first proviso to section 2, that the county commissioners shall not modify the boundaries of a proposed district so as to exempt from the operation of the act any territory within the proposed boundaries "which is susceptible of irrigation by the same system of works applicable to other lands in such proposed districts"; as well as the second proviso in the same section that "any person whose lands are susceptible of irrigation from the same source shall, upon application to the board, be entitled to have his lands included in said district," are to be taken into consideration.—*Montezuma District v. Longenbaugh*, 391.

A statute defining and denouncing a crime is to be strictly construed as against the state, but is not to be confined within narrower limits than the legislative intent. The legislative purpose is not to be destroyed by construction.—*Sheely v. People*, 136.

*Maxims—of Construction—e. g., "Ejusden generis," "Noscitur a sociis," "Expresio unius exclusio alterius,"* are to be resorted to only when they afford aid in ascertaining the legislative intent.

The maxims interpreted, their application explained, and *held* that in the words "any judge, justice of the peace, sheriff, coroner, clerk, constable, jailer, attorney general, or prosecuting attorney, mayor, alderman, or member of city council, member of legislative assembly, *or other officer, ministerial or judicial,*" in Rev. Stat., sec. 1720, it is not apparent that the legislature had in mind any particular class of officers, and that therefore these maxims afford no aid in the interpretation of the statute.—*Sheely v. People*, 136.

*Construed*—A statute (Mills' Stat., sec. 4720) provided that when the letters of one of several administrators are revoked, etc., the county court may in its discretion "join others in their stead and place * * * and in case the letters of all of them shall be revoked, or all * * * shall depart this life before final settlement, etc., administration with the will annexed, or as the case may require, shall be granted to the person next entitled thereto." *Held*, that where the will so provided, executors might be appointed by the county court, as successors to those named in the will, and with all the estate and powers granted to, or conferred by the will upon, the original executors.—*Tuckerman v. Currier*, 25.

The defendant railway company had abandoned the operation of that part of its railway between Breckenridge and Como, twenty-one miles in length, and operated only a combination train between Denver and Como. The effect was that all the freight between Denver, the commercial and political center of the state, and Breckenridge, a min-

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*STATUTES—Continued.*

ing village of 800 souls, was required to pass by another railroad, a distance of 317 miles, breaking bulk on two occasions, and consuming several days; whereas if trains were regularly operated upon defendant's railway, the distance was only 110 miles, and the freight was received upon the day of its shipment. Passengers, too, were required to go by the same circuitous route, and one desiring to travel from Breckenridge to Como, only 21 miles by defendant's railroad, was required to travel nearly 400 miles. Moreover the freight charge, and the passenger rate, were greatly increased. *Held*, that under the act creating the railroad commission (Laws 1910, c. 5) the commission was authorized to require the defendant to resume the operation of its line between Como and Breckenridge, and to operate a passenger train, daily except Sundays, between Denver and Leadville by the way of Como and Breckenridge, and a through freight train at least three days in each week.

Section 11 of the amendatory act organizing the railroad commission (Laws 1910, c. 5), provided that three commissioners should be appointed by the governor, but with the proviso that those elected under the original act should continue in office for certain terms specified. *Held*, that the effect of the statute was not to create an office, and at the same time designate the persons who should fill it, but to retain the commissioners then in office by election of the people, excepting them from the operation of the power of appointment conferred upon the executive.

The constitution (art. XV, sec. 3) provides that the general assembly may alter the charter of any corporation theretofore granted, when in their opinion injurious to the citizens of the state, "but only in such manner that no injustice shall be done to the incorporators."

A statute (clause 6, sec. 602, Mills' Stat.) provides that railroad companies organized under the act shall have power "to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor." *Held*, that the rights thus granted were not unlimited, and to be exercised without regard to the interest of the public; that the anticipated benefit to the public was the consideration of the franchise granted; that the acceptance of the grant by the corporation imposes upon it the obligation to operate its railroad, when constructed, in the manner and for the purposes contemplated by the statute; that the grant must be read in connection with the other provisions of the statute, and with the obligations which the law, independent of any statute, impliedly imposes, to furnish such service as may reasonably accommodate the public; that the surrender, either by constitutional or statutory provision, of the power of the state to reasonably control railroad companies is not to be inferred in the absence of positive words to that

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*STATUTES—Continued.*

effect, and no such words are found either in the constitution or statute.

*Held*, further, that to require a railway company to resume the operation of a portion of this railway which it had abandoned, even though such operation might be unprofitable, was not an injustice to the corporation, nor the taking of its private property without due process of law, where it appeared that the suspension of operation had occasioned and would occasion great inconvenience and additional burdens to the public.—*Colorado Etc. Co. v. Railroad Commission*, 64.

An act making elaborate provision for regulating the business of insurance, and the conduct of insurance companies (Rev. Stat., c. 70) contained a section imposing, beside certain fees, an annual tax upon the gross amount of the annual premiums collected by the insurance companies, and exempted such corporations from all other taxes except those assessed upon real property. This exemption was void under sec. 6 of art. X of the constitution. Considering that since 1883, in all legislation upon the subject, insurance companies had been required to pay, in some form, a similar regulation tax, *held*, that the clause containing the exemption might be rejected, and the residue of the section saved.—*Colorado Life Co. v. Clayton*, 256.

A statute allowed the coroner a specified fee for each day employed in holding an inquest. Another statute prescribed the manner in which accounts against the county should be made, requiring that each item should be separately stated, and adding "and where no specific fees are allowed by law the time actually and necessarily devoted to the performance of any service charged in such account shall be specified." *Held*, that the latter statute has not the effect to entitle the coroner to compensation for the investigation of violent or sudden deaths, where no inquest was held.—*McGovern v. Denver*, 411.

*Dormant Statute*—Things clearly prohibited do not become lawful by the failure, for many years, to enforce the legislative will.—*Everhart v. People*, 272.

*STATUTES CONSTRUED, CITED OR REFERRED TO.*

Revised Statutes, c. 70—*Colorado Co. v. Clayton*, 256.

Revised Statutes, c. 121, art. VII—*Colorado Co. v. Railroad Commission*, 64.

Revised Statutes, Sec. 1215—*Denver v. Pitcher*, 203.

Revised Statutes, Sec. 1219—*McGovern v. Denver*, 411.

Revised Statutes, Sec. 1472—*King v. People*, 122.

Revised Statutes, Sec. 1620—*People v. Zobel*, 284.

Revised Statutes, Sec. 1622—*King v. People*, 122.

Revised Statutes, Sec. 1624—*Id.*

Revised Statutes, Secs. 1625-1628—*Henwood v. People*, 188.

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*STATUTES CONSTRUED, CITED OR REFERRED TO—Continued.*

Revised Statutes, Sec. 1632—*Bailey v. People*, 337.
Revised Statutes, Sec. 1720—*Sheely v. People*, 136.
Revised Statutes, Sec. 1791—*Everhart v. People*, 272.
Revised Statutes, Sec. 1792—*Id.*
Revised Statutes, Sec. 1796—*Id.*
Revised Statutes, Sec. 1997—*People v. Zobel*, 284.
Revised Statutes, Sec. 2109—*People v. District Court*, 237.
Revised Statutes, Sec. 2122—*Loth v. Loth's Estate*, 200.
Revised Statutes, Sec. 2159—*People v. Hoag*, 542.
Revised Statutes, Sec. 2415—*Lyons v. Longmont*, 112.
Revised Statutes, Sec. 2416—*Id.*
Revised Statutes, Sec. 2458—*et seq., Id.*
Revised Statutes, Sec. 2577—*McGovern v. Denver*, 411.
Revised Statutes, Sec. 3024—*Springhetti v. Hahnewald*, 383.
Revised Statutes, Sec. 3102—*Colorado Co. v. Clayton*, 256.
Revised Statutes, Sec. 3300—*Larimer County v. Annis*, 331.
Revised Statutes, Sec. 4025—*Salzer Co. v. Lindenmeier*, 491; *Curtis v. Nunns*, 554.
Revised Statutes, Sec. 4027—*State Bank v. Plummer*, 144; *Horn v. Clark Co.*, 522.
Revised Statutes, Sec. 4029—*Id.*
Revised Statutes, Sec. 4030—*Id.*
Revised Statutes, Sec. 4033—*Id.*
Revised Statutes, Sec. 4073—*Empire Co. v. Zehr*, 185.
Revised Statutes, Sec. 4087—*Silford v. Stratton*, 248.
Revised Statutes, Sec. 4090—*Marks v. Morris*, 186.
Revised Statutes, Sec. 4165—*Loth v. Loth's Estate*, 200.
Revised Statutes, Secs. 4587, 4588—*Ayres v. Walker*, 571.
Revised Statutes, Secs. 5410, 5411—*Colorado Co. v. Railroad Commission*, 64.
Revised Statutes, Sec. 5420—*Harrison v. Denver Co.*, 593.
Revised Statutes, Secs. 5428, 5429—*Colorado Co. v. Railroad Commission*, 64.
Revised Statutes, Sec. 5512—*Smith v. Denver Co.*, 288.
Revised Statutes, Sec. 5628—*Denver v. Pitcher*, 203.
Revised Statutes, Sec. 5633—*Id.*
Revised Statutes, Sec. 5636—*Id.*
Revised Statutes, Sec. 5638—*Id.*
Revised Statutes, Sec. 5639—*Id.*
Revised Statutes, Sec. 5659—*Id.*
Revised Statutes, Sec. 5662—*Id.*
Revised Statutes, Sec. 5664—*Id.*
Revised Statutes, Sec. 5666—*Id.*
Revised Statutes, Sec. 5722—*Id*

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*STATUTES CONSTRUED, CITED OR REFERRED TO—Continued.*

Revised Statutes, Sec. 5760—*Id.*
Revised Statutes, Sec. 5767—*Id.*
Revised Statutes, Sec. 6519—*Lyons v. Longmont*, 112.
Revised Statutes, Sec. 6525—*Id.*, *Wolfe v. Abbott*, 531.
Revised Statutes, Sec. 6588—*Lyons v. Longmont*, 112.
Revised Statutes, Sec. 6661—*Powers v. Boulder*, 558.
Revised Statutes, Sec. 6676—*Lyons v. Longmont*, 112.
Revised Statutes, Sec. 6815—*Id.*
Revised Statutes, Sec. 6963—*Young v. People*, 293.
Revised Statutes, Sec. 7121—*Tuckerman v. Currier*, 25.
Revised Statutes, Sec. 7178—*People v. Parker*, 604.
Revised Statutes, Sec. 7273—*Victor v. Smilanich*, 479.
Revised Statutes, Secs. 7277-7279—*LeMaster v. People*, 416.
Mills Statute, Sec. 599—*Colorado Co. v. Railroad Commission*, 64.
Mills Statute, Sec. 602—*Id.*
Mills Statute, Sec. 614—*Id.*
Mills Statute, Sec. 3703—*Id.*
Mills Statute, Sec. 4720—*Tuckerman v. Currier*, 25.
Laws, 1867 (private), 114—*Evarhart v. People*, 272.
Laws, 1901, c. 87, Secs. 1, 2—*Montezuma District v. Longenbaugh*, 391.
Laws, 1910, c. 3—*In re Senate Resolution*, 262.
Laws, 1910, c. 5—*Colorado Co. v. Railroad Commission*, 64.
Laws, 1911, c. 149—*Id.*
Laws, 1911, c. 26—*Denver v. Pitcher.*
Revised Code, Sec. 61—*Springhetti v. Hahnewald*, 383.
Revised Code, Sec. 66—*State Bank v. Plummer*, 144.
Revised Code, Sec. 69—*Id.*
Revised Code, Sec. 81—*Fullen v. Wunderlich*, 349.
Revised Code, Sec. 84—*Springhetti v. Hahnewald*, 390.
Revised Code, Sec. 236—*Liutz v. Denver Co.*, 380.

*STATUTE OF FRAUDS.*

*Sale of Goods*—An agreement by one person to construct an article for, and according to the plans of another, at an agreed price, is a contract for work and labor and not within the statute of frauds. *Ellis v. D. L. & G. R. R. Co.*, 7 Colo. App. 352, distinguished.—*Bond v. Bourk*, 51.

*SURETY COMPANY.*

*Contracts—How Construed.* See CONTRACTS.

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*TAXATION.*

*Assessment—The Purpose of the Provisions of the Constitution and Statute Regulating the Assessment of Property*, is to secure uniformity of taxation in each county of the state, for county purposes, and enable the commissioners in each county to determine the rate of tax necessary to meet the expenses of the county for the ensuing fiscal year. The provisions of the charter of the city and county of Denver, regulating the same matters, were enacted with a like purpose.—*Colorado Tax Commission v. Pitcher*, 203.

*Powers of Assessor—Assessment Roll—When Complete*—The assessor may, at any time before the meeting of the county board of equalization, correct the assessment of any exempt property, the double assessment of the property of any tax-payer, or the assessment to a tax-payer of property of which he was not the owner at the time of the assessment, or any excessive assessment. He may also at any time before the return of the roll to the treasurer, supply clerical omissions and correct clerical errors in the roll, where it can be ascertained therefrom what was intended. He may supply such omissions as come to the notice of the county commissioners of his county, or, in Denver, those to which his attention is directed by the board of supervisors acting as a board of equalization. But where he has delivered to the auditor of state the abstract of the assessment roll required by Rev. Stat., sec. 5659, the roll is deemed complete, and thereafter the assessor may make only those changes which are expressly authorized by the statute.

A horizontal reduction in the assessment thereafter attempted, is without authority of law.—*Colorado Tax Commission v. Pitcher*, 203.

*TAX TITLES.*

*Void Deed*—A treasurer's deed appearing upon its face to be based on a sale to the county, and an assignment of the certificate by the county clerk more than three years after its issuance, is void.—*Silford v. Stratton*, 248.

*TRIALS.*

*Fair Trial—Evil Practice to Influence Jurors—Duty of Court and Attorneys*—If it is made to appear that persons employed by a suitor hang about the purlieus of the court, and the approaches thereto, mingle with those summoned as jurors, converse with them touching causes in which the suitor is concerned, and by flattery, ridicule, and like insidious means, endeavor to improperly influence them, the court has power to punish and suppress the practice, and should not hesitate to employ drastic measures to that end.

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*TRIALS—Continued.*

And it is the duty of attorneys who have knowledge and evidence of such scandalous practices, to bring the matter to the attention of the court, and co-operate in suppressing the evil.

A verdict shown to have been influenced by such practices should be unhesitatingly vacated.—*Liutz v. Denver Co.*, 371.

*Questions for Jury*—Where in an action by a land broker for commissions upon a sale alleged to have been induced by him, his employment, as well as whether he was the producing cause of the sale are in issue, such questions are for the jury.—*Satisfaction Co. v. York*, 566.

*WRIT OF ERROR.*

*Where the Writ Lies—Final Judgment*—An order removing executors, acting as testamentary trustees, and appointing a receiver for the estate is a final judgment, and the executors may have a writ of error to review such order.—*Tuckerman v. Currier*, 24.

The denial of a petition for leave to intervene in a pending cause is a final judgment to which error lies.—*People v. District Court Sixth District*, 576.

*VOLUNTARY BOND.*

*Validity*—A voluntary bond, given upon consideration, not prohibited by law, binds the surety, though not in statutory form.—*National Surety Co. v. People*, 365.

*WATER RIGHTS.*

*Adjudication of Priorities*—It seems that after the proceeding under the statute for the adjudication of priorities has gone to final decree, the same court may, in the same proceeding, entertain a supplemental petition, and adjust the priorities of consumers whose rights were initiated subsequent to such final decree, readjusting and renumbering all priorities from the beginning.—*Larimer County v. Annis*, 331.

*Liability of County for Fees of Referee*—Under section 3300 of the Revised Statutes the counties embraced within a water district are liable for the fees of the referee, not only in the initial proceedings for adjusting priorities, but in a supplemental proceeding had under the original petition, on application of consumers whose rights were not determined by the first decree, but had their inception subsequent thereto.—*Larimer County v. Annis*, 331.

*Abandonment*—Failure for the period of eighteen years to apply to beneficial use or in any manner control, water to which one is entitled, must be regarded as an abandonment of the right, unless some peculiar condition excusing the delinquency is shown. Merely asserting a claim to the right through a continuous chain of paper title, even

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*WATER RIGHTS—Continued.*

though coupled with an oral assertion of the right upon a single occasion, will not suffice.—*Green Valley Co. v. Frantz*, 226.

The evidence examined and *held* to lead to the irresistible conclusion that those under whom plaintiffs claimed had abandoned the right.—*Id.*

*WILLS.*

*Construction*—The intention of the testator is to be derived primarily from the language of the will itself; and it is to receive effect as written, if not opposed to some positive rule of law, or against public policy.

And it is to be presumed that the testator knew the law governing the subject matter of his directions.—*Tuckerman v. Currier*, 25.

Courts are bound to give to a will such a construction as will carry out the plain intention of the testator.—*University of Colorado v. Wilson*, 510.

*Construed*—The testator, a man learned in the law, after certain specific bequests, devised all the rest of his estate "to my said executors * * * and to the survivor of them, and their successors, to hold, manage and dispose of, in trust for the uses and purposes following;" And after providing for the payment of an annuity to his widow, directed that the residue of the net income of his estate should by "said executors," be annually paid over in equal parts, to his two sons; directed that " said executors" should carefully collect and take care of said estate; authorized sales by them of any part of the estate; the re-investment by them of the proceeds of sales; directed that upon the death of both of his sons, "said executors, and the survivor of them, and their successors" should convey all the estate remaining, to the heirs at law of said sons; and finally declared his desire that "said board of executors shall be continued until the purposes of this will are fully accomplished, and the trusts herein created are fully executed; and that any vacancy in said board should on application of any beneficiary herein named, be filled by the appointment of the county court" of the county of his residence. *Held*, that the manifest purpose of the testator was to confer the estate devised, and the trusts and powers prescribed in the will, not upon any person as a personal trust, but upon the persons holding the office of executor, and their successors, in perpetual succession, and to annex such estate and powers to the office of executors. That upon the acceptance of the resignation of the executors named in the will, and a valid appointment of successors, not only the powers, but the trust estate before that vested in the original executors, devolved by operation of law, upon the successors, without the formality of a conveyance.

The will enjoined upon the executors to "distribute fully the total net annual income and increment of my estate to the persons and in

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*WILLS—Continued.*

the time and manner herein provided, and so as to avoid the accumulation in their hands of property in excess of the total value of the assets that shall originally come to them under this will."

*Held*, that under this provision the estate must be dealt with *in solido;* that the increase in the value of one piece of property was not to be segregated, as income; that each parcel of property pertaining to the estate retains its character as part of the body of the estate, until every part of the estate has been subjected to examination and appraisement, and the whole aggregated.—*Tuckerman v. Currier*, 25.

The testator bequeathed $50,000 for the erection and maintenance of a home for poor widows and orphans, but upon a condition precedent impossible in law to be performed, following this bequest with the direction that "otherwise the said $50,000 to revert back, and be divided" among certain legatees named. *Held*, that the manifest intention of the testator was that if, for any reason, the conditions prescribed in the provision made for the home, should not, or could not, be performed the gift over to the legatees should immediately take effect. An order making distribution accordingly, affirmed.—*University of Colorado v. Wilson*, 510.

*Power of Testator to Appoint Successors to Executor*—It seems that where the will directs that if the executor named dies, another shall be his successor, the one so designated is executor by substitution, and not a mere administrator *de bonis non.* No rule of law prevents a testator from providing a system for the selection of a successor to the executor named in his will. He may provide conditional, limited, or substituted executors, in case of vacancy, conferring upon them the same powers as conferred upon those first designated.—*Tuckerman v. Currier*, 25.

And the county court, upon a provision in the will to that effect, may appoint a successor to the executor, with all the powers which the will confers upon the original executor.—*Id.*

*WITNESSES.*

*Competency*—One K, while in the employ of the corporation whose moneys the prisoner was alleged to have embezzled had been giving information to the attorneys of certain parties with whom the company was dealing. Being discharged he was at once taken into the care of, and supported by, one of these parties, a creditor of the company, and the same by whom the present accusation was instigated and prosecuted. The same witness had made oath to the information against the prisoner. *Held*, that he was nevertheless a competent witness for the people.—*LeMaster v. The People*, 415.

Under Rev. Stat., sec. 7273, not all children under ten years of age are made incompetent as witnesses, but only such as "appear incapable

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*WITNESSES—Continued.*

of receiving just impressions of the facts respecting which they are examined, or of relating them truly." The question of the competency of the child is addressed to the sound discretion of the trial court, and its determination will not be disturbed unless it appears from the examination of the child on the *voir dire*, or from his testimony, that the court clearly abused its discretion. Where it appeared that a boy of six and a half years understood that he was required to tell the truth, and could be punished if he did not, that he had a fair understanding of the obligation of an oath, and of the facts which he detailed, *held*, that no abuse of discretion was committed in receiving his testimony. —*City of Victor v. Smilanich*, 479.

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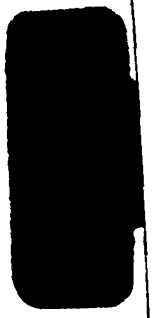

HARVARD L

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